A **INDIRA GANDHI MUTHO v. PENGARAH JABATAN AGAMA ISLAM PERAK & ORS AND OTHER APPEALS**

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
B ZAINUN ALI FCJ
ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
[CIVIL APPEALS NO: 01(f)-17-06-2016 (A),
01(f)-18-06-2016 (A) & 01(f)-19-06-2016 (A)]
C 29 JANUARY 2018

ADMINISTRATIVE LAW: *Judicial review – Legality of decisions of public authorities – Reviewing approach – Conversion to Islam – Conversion of non-Muslim children to Islam – Legality and constitutionality of administrative action*
D *taken by Registrar of Muallafs in exercise of statutory powers – Whether High Court had exclusive jurisdiction to exercise supervisory powers – Whether Syariah courts conferred with power to review administrative decisions of authorities – Whether judicial power could be removed from civil courts – Whether jurisdiction of Syariah court must be expressly conferred by state legislation – Whether relief sought in*
E *nature of inherent powers of civil court – Whether Syariah court has no jurisdiction over non-Muslims and non-Muslims had no locus before Syariah court – Whether effect of art. 121(1A) of Federal Constitution to oust jurisdiction of civil courts when subject matter relates to Islamic religion – Whether High Court seised with jurisdiction, to exclusion of Syariah court, to hear matter – Courts of Judicature Act 1964, ss. 23, 24 & 25 – Rules of Court 2012, O. 53*
F

CONSTITUTIONAL LAW: *Courts – Civil and Syariah courts – Whether distinct in nature and status – Civil court – Whether established under the Federal Constitution and vested with inherent judicial powers – Syariah court – Whether creatures of state legislation – Whether akin to inferior tribunal – Interpretation of*
G *art.121(1A) of Federal Constitution – Whether not to be interpreted in isolation – Whether granting exclusive jurisdiction to Syariah court in all matters of Islamic law*

JURISDICTION: *Syariah court – Conversion to Islam – Conversion of non-Muslim children to Islam – Certificate of conversion – Issues on conversion –*
H *Validity – Whether within jurisdiction of Syariah court – Whether within realm of constitutional and administrative law – Whether should jurisdictionally be triable before civil court – Administration of Religion of Islam (Perak) Enactment 2004, s. 50(3)(b) – Proper interpretation – Whether conferring jurisdiction to Syariah Court to determine validity of a person's conversion to Islam – Federal Constitution,*
I *arts. 8(2), 12(4)*

ISLAMIC LAW: *Conversion to Islam – Conversion of non-Muslim children to Islam – Certificate of conversion – Certificate issued by Registrar of Muallafs – Whether valid – Whether ss. 96 & 106 of Administration of the Religion of Islam (Perak) Enactment 2004 has effect of excluding High Court's power to review issuance of certificate of conversion by Registrar of Muallafs – Requirements in ss. 96 & 106 – Whether cumulative – Language of s. 101(2) – Whether purporting to oust judicial review – Whether precluded High Court from reviewing Registrar of Muallafs' decision*

ISLAMIC LAW: *Registrar of Muallafs – Statutory power – Conversion to Islam – Issuance of certificate of conversion – Exercise of powers thereof – Legal limits to exercise of legal powers thereof – Validity of Certificate of Conversion – Whether ss. 96 & 106 of Administration of the Religion of Islam (Perak) Enactment 2004 has effect of excluding High Court's power to review issuance of certificate of conversion by Registrar of Muallafs – Requirements in ss. 96 & 106 – Whether cumulative – Language of s. 101(2) – Whether purporting to oust judicial review – Whether precluded High Court from reviewing Registrar of Muallafs' decision*

FAMILY LAW: *Children – Conversion – Conversion of non-Muslim children to Islam – Whether consent of both parents must be sought – Whether both parents ought to have equal rights in upbringing of children – Whether conversion of one spouse to Islam altered antecedent legal position – Consideration of welfare of child – Equality of parental right – Whether certificate of conversion issued without consent of one parent contravened art. 12(4) of Federal Constitution and Guardianship of Infants Act 1961, ss. 5 & 11*

These present appeals arose from an application for judicial review of the administrative actions of an executive body in exercise of its statutory powers. The facts were that the appellant and the sixth respondent were married under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). There were three children of the marriage. On 11 March 2009, the sixth respondent converted to Islam and subsequently, the appellant received documents from the sixth respondent showing that her three children had been converted to Islam and that the Pengarah Jabatan Agama Islam Perak had issued three certificates of conversion to Islam on the said three children. The documents also showed that the Registrar of Muallafs had registered the children as Muslims. Aggrieved, the appellant filed an application for judicial review at the High Court for an order of *certiorari* to quash the certificates of conversion to Islam of the children. The appellant contended that the issuance of the certificates of conversion to Islam by the Registrar of Muallafs were *ultra vires* and illegal. It contravened the provisions of ss. 96 and 106(b) of the Administration of the Religion of Islam ('Perak') Enactment 2004 ('the Perak Enactment 2004'), ss. 5 and 11 of the Guardianship of Infants Act 1961 ('GIA') and art. 12(4) read together with art. 8(2) of the Federal Constitution. At the High Court, it was held that art. 121(1A) of the Federal Constitution does not confer jurisdiction for

constitutional interpretation on the Syariah courts to the exclusion of the civil courts. The Judicial Commissioner ('JC') declared that the requirements of ss. 96 and 106 of the Perak Enactment must be complied with by the Registrar of Muallafs in issuing the certificates of conversion. Section 101(2) which states that the certificates shall be conclusive proof of the fact stated therein, was held not to oust the jurisdiction of the court where there is patent non-compliance with the statutory requirements. Accordingly, the JC found that the High Court had exclusive jurisdiction to hear the application. The High Court decision was reversed by the Court of Appeal, which had rejected the JC's approach in determining the constitutionality of the conversion process. The Court of Appeal held that the High Court had no power to question the decision of the Registrar of Muallafs or to consider the Registrar's compliance with the statutory requirements of ss. 96 and 106 of the Perak Enactment. The Court of Appeal took the position that the fact that a person had been registered in the Registrar of Muallafs as stated in the certificates of conversion was proof that the conversion process had been done to the satisfaction of the Registrar. Thus, the appellant in these appeals appealed against the said decision of the Court of Appeal. The Federal Court granted leave for the following questions of law (i) whether the High Court had the exclusive jurisdiction pursuant to ss. 23, 24 and 25 and the Schedule of the Courts of Judicature Act 1964 ('CJA') (read together with O. 53 of the Rules of Court 2012 ('the ROC')) and/or its inherent jurisdiction to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Perak Enactment; (ii) whether a child of a marriage under the LRA (a civil marriage) who had not attained the age of 18 years must comply with both ss. 96(1) and 106(b) of the Perak Enactment before the Registrar of Muallafs or his delegate may register the conversion to Islam of that child; and (iii) whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam could be issued in respect of that child.

Held (allowing appeals)

Per Zainun Ali FCJ delivering the judgment of the court:

(1) Section 25 and para. 1 to the Schedule of the CJA and O. 53 of the ROC confer jurisdiction on the High Courts to exercise supervisory powers. The Syariah courts are not conferred with the power to review administrative decisions of the authorities. In particular, the power of judicial review is essential to the constitutional role of courts, and inherent in the basic structure of the Constitution. It cannot be abrogated or altered by Parliament by way of a constitutional amendment. (paras 40 & 42)

(2) The significance of the exclusive vesting of judicial review in the Judiciary, and the vital role of judicial review in the basic structure of the constitution is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party. Secondly, judicial power cannot be conferred on any other body whose members do not enjoy the same level of constitutional protection as civil court judges do to ensure their independence. Parliament cannot just declare formally that a new court is a superior court or shares the rank of being at the apex of the judicial hierarchy; the test is substantive, requiring an examination of the composition and powers of the new court. (paras 45 & 47)

(3) The jurisdiction of the Syariah courts to determine a subject matter of a dispute must be expressly conferred by the state legislation. The State must claim ownership over the subject matters that fall within the jurisdiction of the Syariah courts by providing for it expressly in its legislation; because otherwise, the Syariah courts could be excluded from deciding on a subject matter which falls within Item 1 of List II (State List) in the Ninth Schedule to the Federal Constitution. In these present appeals, s. 50(3)(b)(x) of the Perak Enactment 2004 was not applicable as nowhere was there any express provision in the said section which confers jurisdiction on the Syariah court to determine the validity of a person's conversion to Islam. Thus, the Court of Appeal had misdirected itself on the construction of s. 50(3)(b) of the Perak Enactment 2004. (paras 57-62)

(4) Both cls. (1) and (1A) of art. 121 of the Federal Constitution illustrates the respective regimes in which each court operates. Thus, issues of jurisdiction and conferment of powers in the civil courts and the Syariah courts are clearly drawn. Both the civil and Syariah courts co-exist in their respective spheres, even if they are dissimilar in the extent of their powers and jurisdiction, in that, the civil courts are possessed of powers, fundamental and intrinsic, as outlined in the Federal Constitution. If the relief sought is in the nature of the 'inherent powers' of the civil court (for example, judicial review) or if it involves constitutional issues or interpretation of the law, then the civil courts would be seised with jurisdiction to determine the issue, regardless of its subject matter and especially if it comes within the scope and ambit of judicial powers. (paras 65 & 66)

(5) It is not open for the Syariah courts to enlarge their own jurisdiction by agreements. Where the subject matter is within the purview of the Syariah court but the party appearing before it is not, the matter

cannot be brought before the Syariah court. It is trite that the Syariah court has no jurisdiction over non-Muslim parties and non-Muslim parties have no *locus* before the Syariah court. The jurisdiction of the Syariah courts, in so far as the operation of Islamic law is concerned, is confined to the private aspect and does not extend to its public one. Ultimately, the subject matter is one of personal rather than constitutional law. (paras 68-72)

(6) The effect of art. 121(1A) is not to oust the jurisdiction of the civil courts as soon as a subject matter relates to the Islamic religion. Although judicial trend in the past have taken the position that since matters of conversion involves Islamic law and practice, it must follow that the Syariah courts must have jurisdiction over such matters to the exclusion of the civil courts, this approach was unduly simplistic. It ignores the broader constitutional context in which art. 121(1A) is framed. The powers of judicial review and of constitutional or statutory interpretation are pivotal constituents of the civil courts' judicial power under art. 121(1). Such power is fundamentally inherent in their constitutional role as the bulwark against unlawful legislation and executive action. As part of the basic structure of the constitution, it could not be abrogated from the civil courts or conferred upon the Syariah courts, whether by constitutional amendment, Act of Parliament or state legislation. (paras 85-98)

(7) The subject matter in the appellant's application was not concerned with the status of her children as Muslims converts or with the questions of Islamic personal law and practice, but rather with the more prosaic questions of the legality and constitutionality of the administrative action taken by the Registrar in the exercise of his statutory powers. Since the appellant was a non-Muslim and so had no *locus* to appear before the Syariah court for the present application, the matter was now before this court, seeing as the Syariah court does not have the power to expand its own jurisdiction to choose to hear the appellant's application. The High Court was seised with jurisdiction, to the exclusion of the Syariah court, to hear the matter and had rightly done so. Thus, the first question was answered in the affirmative. (paras 102-104)

(8) The legal limits of the Registrar of Muallafs' statutory power to issue certificates of conversion are prescribed in the Perak Enactment 2004. The requirements in ss. 96 and 106 are cumulative; both must be complied with. Section 96 is phrased in mandatory terms, spelling out the requirements that 'shall be complied with for a valid conversion of a person to Islam.' Nowhere in that section or anywhere else in the Perak Enactment was it suggested that the s. 96 requirement may be

dispensed with for any category of applicants; nor does the Enactment confer any discretion upon the Registrar of Muallafs to dispense with the requirement in respect of an applicant under the age of 18. In fact the provisions of s. 100 sets out the procedure clearly; if the s. 96 requirement is fulfilled in respect of an applicant, he may proceed to register the applicant's conversion; if s. 96 is not fulfilled; he may permit the applicant to utter the two clauses of the affirmation of faith in his presence or that of his officers to ensure that s. 96 is fulfilled. (para 124)

(9) The appellant's children did not utter the two clauses of the affirmation of faith and were not present before the Registrar of Muallafs before the certificate of conversion was issued. The requirement in s. 96(1) had not been fulfilled. The issuance of the certificates despite the non-fulfilment of the mandatory statutory requirement was an act which the Registrar had no power to do under the Enactment. In so doing, the Registrar had misconstrued the limits of his power and acted beyond its scope. The lack of jurisdiction by the Registrar rendered the certificates issued a nullity. Section 101(2) could not have the effect of excluding the court's power of judicial review over the Registrar's issuance of the certificate. It is settled law that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause. It would be repugnant to the rule of law and the judicial power of the courts if the Registrar's decision is immune from review, even in light of uncontroverted facts that the Registrar had no jurisdiction to make such a decision. (para 125)

(10) The crux of the appellant's challenge was against the legality of the Registrar's act in issuing the certificate of conversion, not the facts stated in the Certificate. The contention that since the certificate conclusively states that the Registrar had registered the conversion of the children, the process of conversion must have been done to the satisfaction of the Registrar in accordance with the Enactment, was untenable at best. As such, the respondent's reliance on s. 101(2) of the Perak Enactment 2004 was wholly misconceived. The second question was therefore answered in the affirmative. (paras 132-134)

(11) Conversion to another religion is a momentous decision affecting the life of a child, imposing on him a new and different set of personal laws. Where a decision of such significance as the conversion of a child is made, it is undoubtedly in the best interests of the child that the consent of both parents must be sought. The contrary approach of allowing the child to be converted on the consent of only one parent would give rise to practical conundrums. A purposive reading of art. 12(4) of the Federal Constitution that promotes the welfare of the

child and is consistent with good sense would require the consent of both parents (if both are living) for the conversion of a minor child. Since custody of the children had been granted to the appellant, it was the appellant who exercised the dominant influence in their lives. To allow the other spouse to unilaterally convert the children without the appellant's consent would amount to a serious interference with the lifestyle of the family. (paras 156, 157 & 160)

(12) In a situation where one party to a civil marriage has converted to Islam, the ex spouse (*ie*, the converting spouse) remains bound by their legal obligation under the LRA and the application thereof was not excluded by virtue of s. 3(3) of the LRA. The same principle could be applied in respect of the operation of the GIA in the present appeals. The children in question are children of the Hindu marriage between the appellant and her husband. Under the GIA, both parents have equal rights in relation to the custody and upbringing of the infant children and the wishes of both are to be taken into consideration. The conversion of the husband to Islam did not alter the antecedent legal position, nor did it bring the children out of the ambit of the GIA. Based on a purposive interpretation of art. 12(4) read with the Eleventh Schedule of the Federal Constitution, and on an application of ss. 5 and 11 of the GIA, it was concluded that the consent of both the appellant and her husband were required before a Certificate of Conversion to Islam could be issued in respect of the children. The third question was thus answered in the affirmative. (paras 172-174)

Per Zulkefli Ahmad Makinudin PCA delivering additional judgment of the court:

(1) The issue of religious conversion of young children into the Islamic faith is a contentious issue and has been the subject of discussion in the public domain in recent times. Even the Executive and the Legislature have been contemplating introducing an amendment to the relevant laws to give effect to the position of the rightful party over the issue. In deciding the issue before us, as judges, we are not swayed by our religious convictions and sentiment over the issue. It may be so that looking at the issue purely from the view point of the Syariah law and its precepts, that the decision may lean in favour of the party who argues from that perspective of the law. In the present case, in upholding the rule of law, this court had to decide on the issue strictly on the basis of the relevant laws, case authorities and the provisions of both the State and the Federal Constitution governing the particular issue. (paras 185-188)

***Bahasa Malaysia** Headnotes*

Rayuan-rayuan ini timbul susulan permohonan semakan kehakiman tindakan-tindakan pentadbiran badan eksekutif dalam penjalanan kuasa-kuasa statutorinya. Fakta menunjukkan perayu dan responden keenam berkahwin bawah Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ('LRA'). Terdapat tiga orang anak hasil perkahwinan ini. Pada 11 Mac 2009, responden keenam memeluk agama Islam dan berikutan itu, perayu menerima dokumen-dokumen daripada responden keenam yang menunjukkan ketiga-tiga anak mereka telah diislamkan dan Pengarah Jabatan Agama Islam Perak telah mengeluarkan tiga sijil pengislaman mereka. Dokumen-dokumen tersebut juga menunjukkan Pendaftar Muallaf telah mendaftarkan ketiga-tiga anak ini sebagai Muslim. Terkilan, perayu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi bagi satu perintah *certiorari* untuk membatalkan sijil-sijil pengislaman ketiga-tiga anak ini. Perayu menghujahkan pengeluaran sijil pengislaman oleh Pendaftar Muallaf adalah *ultra vires* dan tidak sah. Ini bercanggah dengan peruntukan ss. 96 dan 106(b) Enakmen Pentadbiran Agama Islam (Perak) 2004 ('Enakmen Perak 2004'), ss. 5 dan 11 Akta Penjagaan Kanak-Kanak ('GIA') dan per. 12(4) dibaca bersekali dengan per. 8(2) Perlembagaan Persekutuan. Di Mahkamah Tinggi, diputuskan bahawa per. 121(1A) Perlembagaan Persekutuan tidak memberi bidang kuasa tafsiran perlembagaan kepada mahkamah Syariah hingga mengetepikan mahkamah sivil. Pesuruhjaya Kehakiman ('PK') memutuskan bahawa syarat-syarat ss. 96 dan 106 Enakmen Perak 2004 mesti dipatuhi oleh Pendaftar Muallaf apabila mengeluarkan sijil-sijil penukaran agama. Seksyen 101(2), yang memutuskan bahawa sijil-sijil ini adalah bukti muktamad fakta yang dinyatakan, diputuskan tidak menyingkirkan bidang kuasa mahkamah apabila jelas terdapat ketidakpatuhan syarat-syarat statutori. Oleh itu, PK memutuskan Mahkamah Tinggi mempunyai bidang kuasa eksklusif untuk mendengar permohonan tersebut. Keputusan Mahkamah Tinggi diakas oleh Mahkamah Rayuan yang menolak pendekatan PK dalam memutuskan keperlembagaan proses penukaran agama. Mahkamah Rayuan memutuskan Mahkamah Tinggi tiada kuasa mempersoalkan keputusan Pendaftar Muallaf atau mempertimbangkan pematuhan Pendaftar akan syarat-syarat statutori ss. 96 dan 106 Enakmen Perak 2004. Mahkamah Rayuan berpendapat bahawa fakta seseorang itu berdaftar dengan Pendaftar Muallaf, seperti yang dinyatakan dalam sijil-sijil penukaran agama, adalah bukti proses penukaran agama dijalankan setelah Pendaftar berpuas hati. Maka perayu-perayu dalam rayuan-rayuan ini merayu terhadap keputusan Mahkamah Rayuan. Mahkamah Persekutuan memberi kebenaran berdasarkan soalan-soalan undang-undang berikut (i) sama ada Mahkamah Tinggi mempunyai bidang kuasa eksklusif bawah ss. 23, 24 dan 25 Jadual Akta Mahkamah Kehakiman 1964 ('AMK') (dibaca bersekali dengan A. 53 Kaedah-Kaedah Mahkamah 2012 ('KKM')) dan/atau bidang kuasa inheren untuk menyemak tindakan

Pendaftar Muallaf atau wakil beliau yang bertindak sebagai pihak berkuasa awam dalam menjalankan kuasa-kuasa statutori yang diperuntukkan oleh Enakmen Perak 2004; (ii) sama ada seorang kanak-kanak hasil perkahwinan bawah LRA (perkahwinan sivil) yang belum mencapai umur 18 tahun mesti mematuhi ss. 96(1) dan 106(b) Enakmen Perak 2004 sebelum Pendaftar Muallaf atau wakilnya boleh mendaftarkan pengislaman kanak-kanak tersebut; dan (iii) sama ada ibu dan ayah (jika kedua-keduanya masih hidup) seorang kanak-kanak hasil perkahwinan sivil mesti memberi kebenaran sebelum sijil penukaran agama ke Islam dikeluarkan bagi anak tersebut.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Zainun Ali HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 25 dan perenggan 1 Jadual AMK dan A. 53 KKM memberi bidang kuasa kepada Mahkamah-mahkamah Tinggi menjalankan kuasa-kuasa pengawasan. Mahkamah Syariah tidak diberi kuasa menyemak keputusan-keputusan pentadbiran pihak berkuasa. Khususnya, kuasa semakan kehakiman penting buat peranan perlembagaan mahkamah, dan inheren dalam struktur asas Perlembagaan. Ini tidak boleh dibatalkan atau dipinda oleh Parlimen melalui pindaan perlembagaan.

(2) Kepentingan peletakan eksklusif semakan kehakiman pada Kehakiman dan peranan penting semakan kehakiman dalam struktur asas Perlembagaan bercabang dua. Pertama, kuasa kehakiman tidak boleh disingkirkan daripada mahkamah-mahkamah sivil. Bidang kuasa Mahkamah-mahkamah Tinggi tidak boleh dicantas atau dicabuli. Oleh itu, jika pun satu-satu keputusan pentadbiran diisytiharkan sebagai statut yang menyelia, pihak yang terkilan tidak terhalang daripada merujuk pada bidang kuasa pengawasan mahkamah. Kewujudan klausa kemuktamadan sekadar menghalang rayuan difailkan oleh pihak terkilan. Kedua, kuasa kehakiman tidak boleh diberi kepada mana-mana badan yang ahlinya tidak menikmati tahap perlindungan berperlembagaan yang sama dengan hakim mahkamah sivil untuk memastikan kebebasan mereka. Parlimen tidak boleh sewenang-wenangnya mengisytiharkan secara rasmi bahawa satu mahkamah baharu adalah mahkamah yang lebih tinggi kedudukannya atau berkongsi kedudukan dengan mahkamah atasan dalam hierarki kehakiman; ujiannya adalah subjektif dan memerlukan pemeriksaan komposisi dan kuasa-kuasa mahkamah baharu.

(3) Bidang kuasa mahkamah-mahkamah Syariah untuk menentukan hal perkara pertikaian mestilah diperuntukkan dengan jelas oleh perundangan negeri. Negeri mestilah menuntut milikan hal-hal perkara yang terangkum dalam bidang kuasa mahkamah-mahkamah Syariah dengan memperuntukkannya secara jelas dalam perundangannya;

jika sebaliknya, mahkamah-mahkamah Syariah terkecuali daripada memutuskan tentang hal perkara yang terangkum dalam item 1 Senarai II (Senarai Negeri) dalam Jadual Kesembilan Perlembagaan Persekutuan. Dalam rayuan-rayuan ini, s. 50(3)(b)(x) Enakmen Perak 2004 tidak terpakai kerana tidak dinyatakan dalam mana-mana, apa-apa peruntukan nyata dalam seksyen tersebut yang memberi bidang kuasa kepada mahkamah Syariah untuk memutuskan tentang kesahan penukaran agama seseorang ke Islam. Oleh itu, Mahkamah Rayuan tersalah arah tentang pembentukan s. 50(3) Enakmen Perak 2004.

(4) Kedua-dua kl. (1) dan (1A) per. 121 Perlembagaan Persekutuan menunjukkan regim setiap mahkamah masing-masing beroperasi. Oleh itu, isu bidang kuasa dan peruntukan kuasa dalam mahkamah sivil dan mahkamah Syariah jelas digariskan. Kedua-dua mahkamah sivil dan Syariah wujud bersama dalam lingkungan masing-masing jika pun kedua-duanya berbeza dari segi tahap kuasa dan bidang kuasanya, iaitu mahkamah-mahkamah sivil mempunyai kuasa, asas dan intrinsik, seperti yang digariskan dalam Perlembagaan Persekutuan. Jika pun relief yang dipohon bersifat 'kuasa inheren' mahkamah sivil (contohnya, semakan kehakiman) atau melibatkan isu-isu perlembagaan atau tafsiran undang-undang, maka mahkamah sivil berbidang kuasa untuk memutuskan isu tersebut, tanpa mengira hal perkaranya dan khususnya jika ini timbul daripada skop dan ruang lingkup kuasa kehakiman.

(5) Tidak terbuka buat mahkamah Syariah untuk meluaskan bidang kuasa mereka melalui perjanjian. Jika hal perkara berada dalam skop mahkamah Syariah tetapi pihak yang hadir tidak, hal perkara ini tidak boleh dihadapkan ke mahkamah Syariah. Menjadi undang-undang tetap bahawa mahkamah Syariah tiada bidang kuasa terhadap pihak-pihak bukan Islam dan pihak-pihak bukan Islam yang tiada *locus* di mahkamah Syariah. Bidang kuasa mahkamah Syariah, setakat operasi undang-undang Islam, terbatas pada aspek peribadi dan tidak meliputi awam. Asasnya, hal perkara ini adalah peribadi berbanding undang-undang perlembagaan.

(6) Kesan per. 121(1A) bukan untuk menyingkirkan bidang kuasa mahkamah-mahkamah sivil sebaik sahaja satu hal perkara berkait dengan agama Islam. Walaupun arah aliran lampau kehakiman berpendapat bahawa oleh kerana hal-hal perkara penukaran agama melibatkan undang-undang dan amalan Islam, mahkamah-mahkamah Syariah semestinya berbidang kuasa dalam hal-hal perkara demikian dan mengetepikan mahkamah-mahkamah sivil, pendekatan ini terlampau mudah. Ini mengabaikan konteks perlembagaan yang lebih luas bawah rangka per. 121(1A). Kuasa semakan kehakiman dan tafsiran perlembagaan atau statutori adalah lingkungan penting kuasa kehakiman mahkamah-mahkamah sivil bawah per. 121(1). Kuasa

A sedemikian adalah, asasnya, inheren dalam peranan perlembagaan sebagai benteng terhadap perundangan tidak sah dan tindakan eksekutif. Sebagai struktur asas Perlembagaan, ini tidak boleh dimansuhkan daripada mahkamah-mahkamah sivil atau diberi kepada mahkamah-mahkamah Syariah, sama ada melalui pindaan
B Perlembagaan, Akta Parlimen mahupun Perundangan Negeri.

(7) Hal perkara dalam permohonan perayu bukan berkenaan status anak-anaknya sebagai penganut baharu Islam atau soalan-soalan tentang undang-undang dan amalan peribadi Islam tetapi lebih pada soalan-soalan yang menjemukan iaitu kesahan dan keperlembagaan tindakan
C pentadbiran yang diambil oleh Pendaftar dalam penjalanan kuasa-kuasa statutori beliau. Oleh kerana perayu bukan Islam dan dengan itu tiada *locus* untuk hadir di mahkamah Syariah bagi permohonan ini, hal perkara ini kini timbul di mahkamah ini kerana mahkamah Syariah tidak mempunyai kuasa meluaskan bidang kuasanya sendiri untuk
D memilih membicarakan permohonan perayu. Mahkamah Tinggi berbidang kuasa, mengetepikan mahkamah Syariah, untuk mendengar hal perkara tersebut dan betul dalam bertindak demikian. Maka, soalan pertama dijawab secara afirmatif.

(8) Had-had perundangan kuasa statutori Pendaftar Muallaf untuk
E mengeluarkan sijil-sijil penukaran agama dinyatakan dalam Enakmen Perak 2004. Syarat-syarat dalam ss. 96 dan 106 adalah kumulatif; kedua-duanya mesti dipatuhi. Seksyen 96 dinyatakan secara mandatori, dengan menggariskan syarat-syarat yang 'harus dipatuhi bagi penukaran sah agama seseorang ke Islam'. Tidak ada mana-mana
F dalam seksyen tersebut mahupun mana-mana bahagian lain dalam Enakmen Perak 2004 yang mencadangkan syarat s. 96 boleh diketepikan bagi mana-mana kategori pemohon; Enakmen juga tidak memberi apa-apa kuasa budi bicara kepada Pendaftar Muallaf untuk mengetepikan syarat-syarat bagi pemohon bawah umur 18 tahun.
G Malah peruntukan s. 100 menetapkan tatacara dengan jelas; jika syarat s. 96 dipenuhi oleh pemohon, beliau boleh terus mendaftarkan penukaran agama pemohon; jika s. 96 tidak dipenuhi, beliau boleh membenarkan pemohon mengucap dua kalimah syahadah dengan kehadiran beliau atau pegawai-pegawai beliau untuk memastikan s. 96 dipenuhi.

H

(9) Anak-anak perayu tidak mengucap dua kalimah syahadah dan tidak hadir di hadapan Pendaftar Muallaf sebelum sijil penukaran agama dikeluarkan. Syarat dalam s. 96(1) tidak dipenuhi. Pengeluaran sijil-sijil, tanpa pematuhan syarat mandatori statutori, adalah tindakan
I tanpa kuasa oleh Pendaftar bawah Enakmen. Dalam berbuat demikian, Pendaftar telah tersalah tafsir batas-batas kuasa beliau dan bertindak melampaui skopnya. Ketiadaan bidang kuasa Pendaftar menjadikan sijil-sijil ini tidak sah. Seksyen 101(1) tidak boleh

mempunyai kesan mengecualikan kuasa semakan kehakiman mahkamah mengatasi pengeluaran sijil Pendaftar. Adalah undang-undang tetap bahawa bidang kuasa pengawasan mahkamah-mahkamah untuk memutuskan kesahan tindakan pentadbiran tidak boleh dikecualikan walaupun melalui klausa nyata penyingkiran. Adalah bertentangan dengan kedaulatan undang-undang dan kuasa kehakiman mahkamah-mahkamah jika keputusan Pendaftar kebal daripada semakan, walaupun berdasarkan fakta-fakta yang tidak disangkal bahawa Pendaftar tiada bidang kuasa membuat keputusan sedemikian.

(10) Pokok pangkal cabaran perayu adalah terhadap kesahan tindakan Pendaftar dalam mengeluarkan sijil penukaran agama, bukan fakta-fakta yang dinyatakan dalam sijil tersebut. Hujahan bahawa memandangkan sijil tersebut secara muktamadnya menyatakan bahawa Pendaftar telah mendaftar penukaran agama anak-anak tersebut, proses penukaran agama mestilah dibuat hingga Pendaftar berpuas hati bawah Enakmen, adalah, paling tidak, tidak dapat dipertahankan. Oleh itu, sandaran responden pada s. 101(2) Enakmen Perak 2004 adalah salah tanggapan sama sekali. Soalan kedua dijawab secara afirmatif.

(11) Penukaran kepada agama lain adalah keputusan penting yang memberi kesan pada kehidupan seorang kanak-kanak, mengenakan dirinya satu gugusan undang-undang peribadi baharu dan berbeza. Jika keputusan sebesar penukaran agama seorang kanak-kanak dibuat, tanpa ragu-ragu lagi, kebenaran kedua-dua ibu bapa diperlukan demi kepentingan kanak-kanak tersebut. Pendekatan bertentangan yang membenarkan seorang kanak-kanak ditukar agamanya dengan kebenaran sama ada ibu atau bapa sahaja akan membangkitkan kepayahan amalan. Bacaan tujuan per. 12(4) Perlembagaan Persekutuan yang menggalakkan kebajikan seorang kanak-kanak dan selaras dengan sikap wajar mengkehendaki agar kebenaran kedua-dua ibu bapa (jika mereka masih hidup) bagi penukaran agama kanak-kanak bawah umur. Memandangkan penjagaan anak-anak ini diberi kepada perayu, perayulah yang mempunyai pengaruh besar dalam kehidupan mereka. Untuk membenarkan satu lagi pasangan menukar agama anak-anak secara sebelah pihak tanpa kebenaran perayu terjumlah sebagai campur tangan serius kehidupan keluarga.

(12) Dalam hal keadaan apabila satu pihak perkahwinan sivil telah memeluk agama Islam, bekas pasangan (iaitu pasangan yang bertukar agama) kekal terikat dengan kewajipan perundangan mereka bawah LRA dan permohonannya tidak dikecualikan bawah s. 3(3) LRA. Prinsip yang sama boleh diguna pakai bagi operasi GIA dalam rayuan-rayuan ini. Kanak-kanak yang terlibat adalah anak-anak hasil

perkahwinan Hindu antara perayu dan suaminya. Bawah GIA, kedua-dua ibu bapa mempunyai hak sama rata jagaan dan didikan anak-anak kecil ini dan harapan kedua-duanya diambil kira. Pertukaran agama si suami ke Islam tidak mengubah sejarah kedudukan undang-undang mahupun membawa anak-anak ini keluar dari ruang lingkup GIA. Berdasarkan tafsiran tujuan per. 12(4) yang dibaca bersekali dengan Jadual Kesebelas Perlembagaan Persekutuan, dan pemakaian ss. 5 dan 11 GIA, disimpulkan bahawa kebenaran kedua-dua perayu dan suaminya diperlukan sebelum sijil penukaran ke agama Islam boleh dikeluarkan bagi anak-anak mereka. Soalan ketiga dijawab secara afirmatif.

Oleh Zulkefli Ahmad Makinudin PMR menyampaikan penghakiman tambahan mahkamah:

(1) Isu-isu penukaran agama kanak-kanak kecil ke agama Islam adalah isu yang menimbulkan perbalahan dan menjadi subjek perbincangan awam mutakhir ini. Badan Eksekutif dan Perundangan sendiri sedang berfikir-fikir untuk meminda undang-undang relevan untuk menguatkuasakan kedudukan pihak yang betul dalam isu ini. Dalam memutuskan isu yang timbul, sebagai hakim, kami tidak terpengaruh oleh kepercayaan dan sentimen agama dalam isu ini. Melihat pada isu ini semata-mata dari sudut undang-undang Syariah dan ajaran-ajarannya, keputusan ini mungkin condong memihak pada pihak yang berhujah dari perspektif undang-undang. Dalam kes ini, dalam menjunjung kedaulatan undang-undang, mahkamah ini perlu tegas memutuskan berdasarkan undang-undang relevan, nas kes-kes dan peruntukan kedua-dua Perlembagaan Persekutuan dan Negeri yang mengawal isu tersebut.

Case(s) referred to:

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***

Attorney-General v. Taylor [2017] NZCA 215 ***(refd)***

Attorney-General for Australia v. The Queen and the Boilmakers' Society of Australia and Ors [1957] AC 288 ***(refd)***

Che Omar Che Soh v. PP [1988] 2 MLJ 55 ***(refd)***

Chng Suan Tze v. Minister for Home Affairs & Ors & Other Appeals [1988] SLR (R) 525 ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC ***(refd)***

Hinds v. The Queen [1977] AC 195 ***(refd)***

Hj Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal [2014] 4 CLJ 253 FC ***(not foll)***

Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155 FC ***(refd)***
In re Agar-Ellis (1883) 24 Ch D 317 ***(refd)***
In re Curtis [1859] 28 LJ Ch 458 ***(refd)***
In re McGrath (Infants) [1893] 1 Ch 143 ***(refd)***
Indira Gandhi Mutho v. Ketua Polis Negara [2016] 5 CLJ 353 FC ***(refd)***
J v. C [1970] AC 668 ***(refd)***
Kamariah Ali & Yang Lain lwn. Kerajaan Negeri Kelantan & Satu Lagi [2004] 3 CLJ 409 FC ***(refd)***
Kesavananda Bharti v. State of Kerala AIR 1973 SC 1461 ***(refd)***
Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Lim Kit Siang v. Dato' Seri Dr Mahathir Mohamed [1987] 1 CLJ 40; [1987] CLJ (Rep) 168 SC ***(refd)***
Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC ***(refd)***
Liyanage v. The Queen [1967] 1 AC 259 ***(refd)***
MacMillan Bloedel Ltd v. Simpson [1995] 4 SCR 725 ***(refd)***
Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
Minerva Mills Ltd v. State of Kerala 1980 AIR 1789 ***(refd)***
Mohammad Faizal Sabtu v. PP [2012] SGHC 163 ***(refd)***
Mohd Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(not foll)***
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
R (Miller) v. Secretary of State for Existing the European Union [2017] UKSC 5 ***(refd)***
R (on the application of Jackson and others) v. Attorney General [2005] UKHL 56 ***(refd)***
Re R (A Minor) (Religions Sect) [1993] 2 FCR 525 ***(refd)***
Re: T (minors), custody: religious upbringing [1975] 2 FLR 239 ***(refd)***
Re Secession of Quebec [1998] 2 SCR 217 ***(refd)***
Re Senate Reform 2014 SCC 32 ***(refd)***
Saravanan Thangathoray v. Subashini Rajasingam & Another Appeal [2007] 2 CLJ 451 CA ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***
Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(not foll)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor [1999] 2 CLJ 707 FC ***(refd)***
Tan Seet Eng v. Attorney General & Another Matter [2015] SGCA 59 ***(refd)***
Tan Sung Mooi v. Too Miew Kim [1994] 3 CLJ 708 SC ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] 1 LNS 138 FC ***(refd)***
Teoh Eng Huat v. The Kadhi Of Pasir Mas, Kelantan & Anor [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 SC ***(refd)***
Trial Lawyers Association of British Columbia v. British Columbia (Attorney General) 2014 SCC 59 ***(refd)***
Viran Nagapan v. Deepa Subramaniam & Other Appeals [2016] 3 CLJ 505 FC ***(refd)***
YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***
Yong Vui Kong v. PP [2015] SGCA 11 ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (State of Selangor) Enactment 2003, s. 112(2)

Administration of the Religion of Islam (Perak) Enactment 2004, ss. 50(3)(b)(x), (xi), 96, 99, 100(5), 101(2), 106(b)

Courts of Judicature Act 1964, s. 25(2), Schedule para. 1

Federal Constitution, arts. 3, 4(1), 5, 8(2), 11, 12(3), (4), 74, 121(1A), 160(1), 160B, Ninth Schedule, Eleventh Schedule

Guardianship of Infants Act 1961, ss. 1(3), 5, 11

Industrial Relations Act 1967, ss. 9(5), (6), 33A(1), 33B(1)

Law Reform (Marriage and Divorce) Act 1976, ss. 3(3), 51, 88

Rules of Court 2012, O. 53

Constitution Act 1867 [UK], ss. 92(14), 96

Constitution of the Republic of Singapore [Sing], art. 4

Other source(s) referred to:

A Harding, Law, Government and the Constitution in Malaysia, 1966, p 137

Azahar Mohamed FCJ, *The Impact of Parallel Legal Systems on Fundamental Liberties in Multi-Religious Societies,* Journal of the Malaysian Judiciary July [2016] JMJ 57

IH Jacob, *The Inherent Jurisdiction of the Court,* para 29

Thio Li-Ann, *A Treatise on Singapore Constitutional Law,* 2012, para 10.054

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[Editor's note: For the Court of Appeal judgment, please see Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals [2016] 1 CLJ 911 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zainun Ali FCJ:

[1] The often misunderstood concept of Islamisation surrounding the issue of religious conversion of young children into the Islamic faith makes articulation of this issue important.

Background Of The Appeals

[2] There are three appeals before this court. They are:

(i) Civil Appeal No 01(f)-17-06-2016 (A) (Appeal No. 17)

(ii) Civil Appeal No 01(f)-18-06-2016 (A) (Appeal No. 18)

(iii) Civil Appeal No 01(f)-19-06-2016 (A) Appeal No. 19)

[3] The appellant in the appeals, Indira Gandhi a/p Mutho is appealing against the decision of the Court of Appeal dated 30 November 2015 allowing the appeals filed by the respondents in Appeals No. 17, 18 and 19, respectively.

[4] The Court of Appeal set aside the decision of the High Court in allowing the appellant's application for judicial review for an order of *certiorari* to quash the Certificates of Conversion to Islam of the children in her marriage with Patmanathan a/l Krishnan, the respondent in Appeal No. 19.

[5] In her application for judicial review, the respondent husband was cited as the sixth respondent while the respondents in Appeal No. 17 (Director of the Islamic Religious Affairs Department of Perak, the Registrar of Muallafs and the Perak Government) and the respondents in Appeal No. 18 (the Ministry of Education and the Government of Malaysia) were respectively cited as the first to the fifth respondents.

[6] The Federal Court had granted leave for the following questions of law:

1. Whether the High Court has the exclusive jurisdiction pursuant to sections 23, 24 and 25 and the Schedule of the Courts of Judicature Act 1964 (read together with Order 53 of the Rules of Court 2012) and/or its inherent jurisdiction to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Administration of the Religion of Islam (Perak) Enactment 2004.
2. Whether a child of a marriage under the Law Reform (Marriage and Divorce) Act 1976 ("a civil marriage") who has not attained the age of eighteen years must comply with both sections 96(1) and 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004 (or similar provisions in State laws throughout the country) before the Registrar of Muallafs or his delegate may register the conversion to Islam of that child.
3. Whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam can be issued in respect of that child.

Facts

[7] Patmanathan ('the sixth respondent') and Indira Gandhi ('the appellant') were married on 10 April 1993. The marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). There were three children of the marriage, Tevi Darsiny, aged 12, Karan Dinish, aged 11 and the youngest, Prasana Diksa, who was 11 months old (at the time of filing of the appellant's application for judicial review).

[8] On 11 March 2009, the sixth respondent converted to Islam. At the time of the sixth respondent's conversion, the two elder children were residing with the appellant while the youngest child was with the sixth respondent. On 8 April 2009, the sixth respondent obtained an *ex parte* interim custody order for all the three children from the Syariah court. He later obtained a permanent custody order on 29 September 2009.

[9] Sometime in April 2009, the appellant received documents from the sixth respondent showing that her three children had been converted to Islam on 2 April 2009 and that the Pengarah Jabatan Agama Islam Perak had issued three Certificates of Conversion to Islam on her three children. The documents also showed that the Registrar of Muallafs had registered the children as Muslims.

[10] Aggrieved with the sixth respondent's action, on 9 June 2009, the appellant filed an application for judicial review in the Ipoh High Court for an order of *certiorari* to quash the Certificates of Conversion to Islam of the children. The appellant contended that the issuance of the Certificates of Conversion to Islam by the Registrar of Muallafs was *ultra vires* and illegal. It contravened the provisions of ss. 96 and 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004 (the Perak Enactment), ss. 5 and 11 of the Guardianship of Infants Act 1961 (the GIA) and art. 12(4) read together with art. 8(2) of the Federal Constitution.

[11] In the meantime, the appellant filed an application in the High Court of Ipoh for custody of the three children pursuant to s. 88 of the LRA. On 11 March 2010, the High Court granted the appellant the custody of the three children. The custody order also directed the sixth respondent to deliver the youngest child, Prasana Diksa, to the appellant immediately.

[12] The appellant subsequently filed a petition for divorce on grounds of her husband's conversion to Islam under s. 51 of the LRA. The divorce was granted on 8 August 2012.

[13] We will deal firstly with the threshold question of jurisdiction. For ease of reference, the first question is:

> Whether the High Court has the exclusive jurisdiction pursuant to section 23, 24 and 25 and the Schedule of the Courts of Judicature Act 1964 (read together with Order 53 of the Rules of Court 2012) and/or its inherent jurisdiction to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Administration of the Religion of Islam (Perak) Enactment.

Proceedings In The Courts Below

[14] At the High Court, the respondents raised a preliminary objection on the High Court's lack of jurisdiction to hear the appellant's judicial review application. The learned Judicial Commissioner (JC), Justice Lee Swee Seng characterised the application as a challenge on the constitutionality of the

respondents' actions, in particular in relation to the fundamental liberties provisions in the Federal Constitution. The learned JC noted that whereas civil courts are creatures of the Constitution, Syariah courts as creatures of State law do not have jurisdiction to determine the constitutionality of matters within its purview.

[15] It was held that art. 121(1A) of the Federal Constitution does not confer jurisdiction for constitutional interpretation on the Syariah courts to the exclusion of the civil courts. The learned JC declared that the requirements of ss. 96 and 106 of the Perak Enactment must be complied with by the Registrar of Muallafs in issuing the Certificates of Conversion. Section 101(2) which states that the certificates shall be conclusive proof of the fact stated therein, was held not to oust the jurisdiction of the court where there is patent non-compliance with the statutory requirements. Accordingly, the learned JC found that the High Court had exclusive jurisdiction to hear the application.

[16] The High Court decision was reversed by a majority in the Court of Appeal. The majority rejected the learned JC's approach in determining the constitutionality of the conversion process. The Court of Appeal held that the High Court had no power to question the decision of the Registrar of Muallafs or to consider the Registrar's compliance with the statutory requirements of s. 96 and 106 of the Perak Enactment. Reference was made to the powers of the Registrar in registering under s. 100, and conclusiveness of the Certificates of Conversion, as proof of the facts stated in s. 101(2). The Court of Appeal took the position that the fact that a person has been registered in the Register of Muallafs as stated in the Certificate of Conversion is proof that the conversion process had been done to the satisfaction of the Registrar.

Submissions At The Federal Court

[17] Reviewing the historical background of the Syariah courts in Malaysia, learned counsel for the appellant submitted that art. 121(1A) does not overrule the general jurisdiction of the High Courts, or enhance the jurisdiction of the Syariah Courts. It was argued that the purpose of the clause, was to prevent civil courts from intervening in lawful decisions made by the Syariah Court. Counsel characterised the subject matter in the present case as one of administrative law, namely whether the Registrar of Muallaffs had acted within the scope of his statutory powers in issuing the Certificate of Conversion. It was contended that the power of judicial review over the administrative actions of public authorities lies within the exclusive jurisdiction of the civil courts, and is inherent in the judicial power constitutionally vested therein.

[18] In contrast, the status of Syariah Courts, being creatures of State Legislatures under powers delineated by the Ninth Schedule in the Constitution, is akin to inferior tribunals. Counsel for the appellant emphasised that the jurisdiction of Syariah Courts is confined to cases where all parties are Muslims, and cannot be exercised over the non-Muslim appellant in this case. It was argued that conversion does not absolve a person from his obligations under the personal law to which he was formerly subject; in such cases the civil court retains jurisdiction.

[19] Common themes found their way in the submissions of the learned State Legal Adviser on behalf of the Director of the Islamic Religious Affairs Department of Perak, the Registrar of Muallafs and the Perak Government (the respondents in Appeal No. 17), the learned Senior Federal Counsel on behalf of the Ministry of Education and the Government of Malaysia (the respondents in Appeal No. 18), and learned counsel for the sixth respondent husband (the respondent in Appeal No. 19). It is the main contention of the respondents that under art. 121(1A), the High Court has no jurisdiction to hear matters within the jurisdiction of the Syariah courts.

[20] The respondents' submissions may broadly be summarised as follows. In determining the jurisdiction of Syariah courts, the subject matter approach is to be preferred. Conversion to Islam is characterised as a strictly religious matter. The Administration of the Religion of Islam (Perak) Enactment expressly confers jurisdiction upon the Syariah court to declare the status of a Muslim; matters of Islamic law are also specially demarcated as falling under the Syariah courts' jurisdiction pursuant to the Ninth Schedule of the Federal Constitution. Since the subject matter does not lie within the High Court's jurisdiction, it was submitted that the High Court cannot exercise its power to review the actions of the Registrar of Muallafs in the present case. If the appellant is dissatisfied with the Registrar's decision, the appropriate route would be to file a challenge in the Syariah court.

Judicial Power Of The High Courts

[21] The starting point in ascertaining jurisdiction is art. 121 of the Federal Constitution. The crux of the issue concerns the interpretation of both arts. 121(1) and (1A):

> Judicial Power of the Federation
>
> 121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) One in the States of Malaya, which shall be known as the High Court of Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

And such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within a jurisdiction of the Syariah Courts.

Basic Structure Of The Constitution

[22] Before dealing with the heart of the matter in these appeals, a clear understanding of the foundation, content and effect of the basic structure of the Constitution is in order.

Constitutional Principles

[23] A constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles. As articulated by the Supreme Court of Canada in *Reference re Senate Reform*, 2014 SCC 32 (at paras. [25]-[26]):

> The constitution implements a structure of government and must be understood by reference to 'the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning …' *The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts … Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law ...*
>
> *These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an 'internal architecture', or 'basic constitutional structure'…* The notion of architecture expresses the principles that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole'… In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in our interpretation understanding and application of the text. (citation omitted)

(emphasis added)

[24] The foundational principles of a constitution shape its basic structure. In Canada, the Supreme Court recognised the rule of law and constitutionalism as fundamental principles underlying their constitution in *Reference re Secession of Quebec* [1998] 2 SCR 217. The court rejected the notion that the system is one of simple, majority rule (at paras. [73]-[74]):

A *An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule.* There are three overlapping reasons.

First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. *Second a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government.* That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally. (emphasis added)

[25] Pertinently, the Supreme Court of Canada took pains to emphasise the protection of minority rights as a principle inherent in the constitutional system. The court continued to elaborate as follows (at para. [80]):

However, we highlight that even though those positions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasise that the protection of minority rights is itself an independent principle underlying our constitutional order.

[26] Another principle which underlies constitutions based on the *Westminster* model, is the separation of powers between the branches of Government. This was recognised in this country in earlier cases. In the Singapore High Court case of *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] SGHC 163, Chan Sek Keong CJ said:

… Likewise under the Singapore Constitution, the sovereign power of Singapore is shared among the trinity of constitutional organs, *viz*, the legislature (comprising the President of Singapore and the Singapore Parliament), the Executive (the Singapore government) and the Judiciary (the Judges of the Supreme Court and the Subordinate Courts). The principle of separation of powers, whether conceived as a sharing or a division of sovereign power between three organs of state, is therefore part of the basic structure of the Singapore Constitution.

The Role Of The Judiciary

[27] Inherent in these foundational principles is the role of the Judiciary as the ultimate arbiter of the lawfulness of state action. The power of the courts is a natural and necessary corollary of the rule of law. In many jurisdictions, this was made clear. In Malaysia, in the seminal decision of the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, Raja Azlan Shah Ag CJ (as his Royal Highness then was) expressed in a passage which has remained inviolable, that:

> … Unfettered discretion is a contradiction in terms. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, *it becomes the duty of the court to intervene. The courts are the only defence of the liberty of the subject against departmental aggression* … (emphasis added)

[28] Similar sentiments were also echoed by the Canadian Supreme Court in *Trial Lawyer's Association of British Columbia v. British Columbia (Attorney General)* 2014 SCC 59 at [39], referring to the provisions in the Constitution Act 1867 on the appointment of judges:

> The section 96 judicial function and the rule of law are inextricably intertwined. As Lamer CJ stated in *MacMillan Bloedel*, "in the constitutional arrangements passed on to us by the British and recognised by the preamble to the Constitution Act 1867, the provisional superior courts are the foundation of the rule of law itself" (para 37). The very rationale for the provision is said to be" the maintenance of the rule of law through the protection of the judicial role": *Provincial Judges* Reference, at para 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

[29] It is notable that the central role of the Judiciary to uphold the rule of law is accepted even in the UK, where the political system is one of Parliamentary Supremacy in the absence of a written constitution. In *R (Miller) v. Secretary of State for Existing the European Union* [2017] UKSC 5, the UK Supreme Court examined a series of historical statutes of "particular importance" and held at para. [42]:

> The independence of the judiciary was formally recognised in these statutes. In the broadest sense, the role of the judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts. That is why and how these proceedings are being decided.

[30] The role of the Judiciary in the interpretation of statutes was also recognised as fundamental by the House of Lords in the case of *R (on the application of Jackson and others) v. Attorney General* [2005] UKHL 56. The ambit of the court's power in this regard is considered not subservient to but of equal importance as the sovereignty of Parliament (at para. [51]):

> This question of statutory interpretation is properly cognisable by a court of law even though it relates to the legislative process. Statutes create law. *The proper interpretation of a statute is a matter for the courts, not Parliament. This principle is as fundamental in this country's constitution as the principle that Parliament has exclusive cognizance (jurisdiction) over its own affairs.* (emphasis added)

[31] It bears emphasis that the Judiciary's exercise of power in accordance with its proper constitutional role does not in any way constitute judicial supremacy. As stated by the Court of Appeal in Singapore in *Tan Seet Eng v. Attorney General & another matter* [2015] SGCA 59 (at paras. [90] and [106]):

> We began this judgment by observing that *the specific responsibility for pronouncing on the legality of government actions falls on the Judiciary. It is appropriate at this juncture to parse this. To hold that this is so is not to place the Judiciary in an exalted or superior position relative to the other branches of the government.* On the contrary, the Judiciary is one of the three co-equal branches of government. But though the branches of government are co-equal, this is so only in the sense that none is superior to any other while all are subject to the Constitution. Beyond this, it is a fact that each branch of government has separate and distinct responsibilities. In broad terms, the legislature has the power to make the laws of our land, and this power extends even to amending the foundation of our notification, the Constitution. The Executive has the power and the responsibility of governing the country within the framework of the laws established by the legislature. And the Judiciary has the responsibility for the adjudication of controversies which carries with it the power to pronounce authoritatively and conclusively on the meaning of the Constitution and all other laws. It is the nature of this latter responsibility that results in the Judiciary being tasked with the role of pronouncing on the legality of government actions.
>
> …
>
> In keeping with this, even for matters falling within the category of 'high policy,' the courts can inquire into whether decisions are made within the scope of the relevant legal power or duty and arrives at in a legal manner. (*De Smith's Judicial Review* at para 1-035). Indeed, this is apparent in *Yong Vui Kong* at [63] where Chong J commented that there would be a judicial remedy available if the procedures under clemency process had not been abided by. In such circumstances, the question of defence to the Executive's discretion simply does not arise. (emphasis added)

[32] On the same note, it is also worth stressing that the role of the Judiciary in upholding constitutionalism and the rule of law is in no way inimical to democratic Government. The Canadian Supreme Court held in *Reference re Secession of Quebec (supra)* (at paras. [75] and [78]):

> In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit 'the people' in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.
>
> ... it might be objected, then, that constitutionalism is therefore incompatible with democratic governments. This would be an erroneous view. *Constitutionalism facilitates – indeed, makes possible – a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it.*
>
> Without that relationship, the political will upon which democratic decisions are taken would itself be undermined. (emphasis added)

Significance Of Basic Structure

[33] The basic structure of a constitution is 'intrinsic to, and arises from, the very nature of a constitution.' (see Calvin Liang and Sarah Shi, *'The Constitution of Our Constitution, A Vindication of the Basic Structure Doctrine'* Singapore Law Gazette (August 2014) 12). The fundamental underlying principles and the role of the Judiciary as outlined above form part of the basic structure of the constitution, being "something fundamental and essential to the political system that is established thereunder" (per Sundaresh Menon CJ in *Yong Vui Kong v. Public Prosecutor* [2015] SGCA 11 [at [71]. It is well settled that features of the basic structure cannot be abrogated or removed by a constitutional amendment (see *Kesavananda Bharti v. State of Kerala* AIR 1973 SC 1461).

[34] Further, as a feature intrinsic to and inherent in the constitutional order itself, these principles are accorded supreme status as against any inconsistent laws, in a political system based on constitutional supremacy. Article 4(1) of the Federal Constitution provides that the Constitution is 'the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.' This provision is in *pari materia* with art. 4 of the Singapore Constitution, which was analysed by Chan Sek Keong CJ in *Mohammad Faizal (supra)* (at paras. [14]-[15]):

A The first fundamental difference is that the UK's *Westminster* model is based on the supremacy of the UK Parliament, under which the UK parliament is supreme, with the result that the UK courts have no power to declare an Act of the UK parliament unconstitutional and, hence, null and void. In contrast, Singapore's *Westminster* model is based on the supremacy of the Singapore Constitution, with the result that the B Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void. Article 4 of the Singapore Constitution expresses this constitutional principle in the following manner:

> C This Constitution is the supreme law of the Republic of Singapore and any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

It should be noted that Article 4 of the Singapore Constitution states that any law inconsistent with this Constitution, as opposed to any law D inconsistent with any provision of this Constitution is void. The specific form of words used in Article 4 reinforces the principle that the Singapore parliament may not enact a law, and the Singapore government may not do an act, which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution.

E **[35]** In fact, so intrinsic is the role of the Judiciary to the constitutional order that it has been characterised as an unalterable 'political fact.' The New Zealand Court of Appeal adopted this reasoning in *Attorney-General v. Taylor* [2017] NZCA 215 (at paras. [47] & [56]-[57]), quoting from Professor Sir William Wade (see *'The Basis of Legal Sovereignty'* [1955] CLJ 172):

F Nor do the higher courts owe their common law judicial authority to Parliament. As Professor Joseph observes no legislation conferred their general and inherent powers of adjudication.

> The superior courts acquired their common law powers of adjudication just as Parliament acquired its co-ordinate power of G legislation – through historical evolution and adjustment without formal grant of the law.

…

When issues arise affecting the legislature's legal authority, recourse must be had to the courts, both for an authoritative answer and as a practical H necessity. To quote Wade & Forsyth:

> Even under the British system of undiluted sovereignty, the last word on any question of law rests with the courts.

I

This means, as Wade explained elsewhere, that: A

> … it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact. B

[36] The Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561) has put beyond a shadow of doubt that judicial power is vested exclusively in the High Courts by virtue of art. 121(1). Judicial independence and the separation of powers are recognised as features in the basic structure of the C Constitution. The inherent judicial power of the civil courts under art. 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism:

> [88] The Judiciary is thus entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the D concept of the independence of the Judiciary is the foundation of the principles of the separation of powers.
>
> [89] This is essentially the basis upon which rests the edifice of judicial power.
>
> [90] The important concepts of judicial power, judicial independence and E the separation of powers are as critical as they are sacrosanct in our constitutional framework.
>
> [91] The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the F Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limit (see *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri* G *Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135).

[37] The notion of the court's role, and the power of judicial review as the bulwark against unconstitutional legislation or unlawful action is echoed in the pithy remarks of Salleh Abas LP in *Lim Kit Siang v. Dato' Seri Dr. Mahathir Mohamed* [1987] 1 CLJ 40; [1987] CLJ (Rep) 168; [1987] 1 MLJ H 383 (at p. 169 (CLJ); pp. 386-387 (MLJ)):

> The courts have a constitutional function to perform and they are the guardians of the constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review – a I concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final

A arbiter between the individual and the state and between individuals *inter se*, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

B **[38]** That judicial power is vested exclusively in the Judiciary is implicit in the very structure of a *Westminster* model constitution itself, whether or not such vesting is expressly stated (*Hinds v. The Queen* [1977] AC 195 (at p. 213)). Referring to the provisions on the appointment and removal of judges in the Constitution of Ceylon, the Privy Council held in *Liyanage v.* C *The Queen* [1967] 1 AC 259 (at p. 287):

> Those provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be D shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature.

Judicial Review

E **[39]** In the first question, the appellant is challenging the administrative power exercised by the Registrar of Muallafs under the Perak Enactment with regard to the registration and issuance of the Certificates of Conversion of the three children. It is important that this is emphasised. That the appellant in the question posed is not questioning the conversion itself but the process and legality thereof. The issue to consider is whether the F Registrar acted with fidelity to its empowering statute in arriving at his decision; and in answering this question, is there need to exhort to intensive forensic study of the same, and whether a more nuanced approach can be taken.

G **[40]** Section 25 and para. 1 to the Schedule of the Courts of Judicature Act 1964 (the CJA) and O. 53 of the Rules of Court 2012 confer jurisdiction on the High Courts to exercise supervisory powers. The Syariah courts are not conferred with the power to review administrative decisions of the authorities.

H **[41]** Subsection 25(2) of the CJA reads:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule.
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

I

Paragraph 1 to the Schedule of the CJA reads:

> Prerogative writs
>
> 1. Power to issue to any person or authority directions, orders or writs including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[42] In particular, the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution. It cannot be abrogated or altered by Parliament by way of a constitutional amendment. In the landmark case of *Kesavananda Bharti (supra)* the Supreme Court of India found the power of judicial review to be indispensable in a Constitution that is federal in character:

> This power of judicial review is of paramount importance in a Federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process … The exclusion by Legislature, including a State Legislature, or even that limited judicial review strikes at the basic structure of the Constitution. Parliament cannot expand its amending powers by way of a constitutional amendment, so as to allow incursions into the basic structure of the constitution and to exclude judicial review.

[43] In *Minerva Mills Ltd v. State of Kerala* 1980 AIR 1789, such an amendment was held to be invalid as a "transparent case of transgression of the limitations on the amending power." The Indian Supreme Court articulated the central importance of judicial review in robust terms worth reproducing in full:

> The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. *I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution* …
>
> *But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution.* If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of sub-version of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. (emphasis added)

[44] Indeed, even the absence of a written constitution in the United Kingdom has not deterred the House of Lords from observing the importance of judicial review as a constitutional fundamental. Per Lord Steyn in *R (on the application of Jackson and others) v. Attorney General* [2005] UKHL 56:

> In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

Significance Of Judicial Review As Part Of The Basic Structure

[45] The significance of the exclusive vesting of judicial power in the Judiciary, and the vital role of judicial review in the basic structure of the constitution, is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party.

[46] In *Liyanage (supra)*, the issue before the Privy Council was the validity of an Act of Parliament which widened the class of offences triable by judges nominated by the Minister of Justice and removed the judges' discretion in terms of sentencing. The Privy Council held that the Act contravened the Constitution of Ceylon in usurping the judicial power of the judicature. Lord Pearce elaborated as follows (at pp. 291-292):

> If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. *And thus judicial power may be eroded.*
>
> *Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid.*

(emphasis added)

[47] Secondly, judicial power cannot be conferred on any other body whose members do not enjoy the same level of constitutional protection as civil court judges do to ensure their independence. 'Parliament cannot just declare formally that a new court is a superior court or shares the rank of being at the apex of the judicial hierarchy; the test is substantive, requiring

an examination of the composition and powers of the new court' (see *Semenyih Jaya (supra)* and also Thio Li-Ann, *A Treatise on Singapore Constitutional Law* (2012: Singapore, Academy Publishing) at 10.054).

[48] Both *Attorney-General for Australia v. The Queen and the Boilermakers' Society of Australia and Ors* [1957] AC 288 and *Hinds v. The Queen* [1977] AC 195 concerned the creation of new courts to exercise judicial functions. In *Attorney-General for Australia (supra)*, the Commonwealth Court of Conciliation and Arbitration was established pursuant to an act of Parliament and conferred with arbitral and judicial functions. The Privy Council held that the act was in contravention of the Constitution of the Commonwealth of Australia. As forcefully elucidated by Viscount Simmonds (at pp. 313-314):

> … *it would make a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon the footing that it is a court vest in it judicial power.* In *Alexander*'s case, which has already been referred to, Griffith CJ once and for all established this proposition in words that have not perhaps always been sufficiently regarded: 'it is impossible,' he said, 'under the Constitution to confer such functions (ie, judicial functions) upon any body other than a court, nor can the difficulty be avoided by designing a body, which is not in its essential character a court, by that name, or by calling the functions by another name. In short, any attempt to vest any part of the judicial power of the Commonwealth in any body other than a court is entirely ineffective.' And in the same case the words came from Barton J.5: 'Whether persons were judges, whether tribunals were courts, and whether they exercised what is now called judicial power, depended and depends on substance and not on mere name. (emphasis added)

[49] In *Hinds (supra)*, the Privy Council held that the Constitution of Jamaica did not permit Parliament to vest in the Gun Court, composed of members of the lower Judiciary, jurisdiction characteristic of a Supreme Court. The Privy Council affirmed that the test for the constitutionality of such laws does not depend on the label of the purported court, but its substance. The nature of the jurisdiction, the method of appointment, and the security of tenure for the judges who are to compose the new court must be regarded. Lord Diplock warned of the consequences if the jurisdiction of the Supreme Court could be transferred to other courts which do not adhere to the constitutional safeguards for independence:

> If, as contended by the Attorney-General, the words italicised above in section 97(1) entitled Parliament by an ordinary law to strip the Supreme Court of all jurisdiction in civil and criminal cases other than that expressly conferred upon it by section 25 and section 44, what would be left would be a court of such limited jurisdiction that the label 'Supreme Court' would be a false description. So too if all its jurisdiction (with those two exceptions) were exercisable concurrently by other courts composed of

A members of the lower judiciary. But more important, for this is the substance of the matter, the individual citizen could be deprived of the safeguards, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the executive
B was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

[50] The principle that judicial power may only be vested in courts, safeguarded by constitutional provisions to ensure judicial independence, was also recognised in Singapore. Chan Sek Keong CJ held in *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] SGHC 163 (at para. [17]):
C

> … the specific wording used in this Article [93 of the Singapore Constitution] has the effect of vesting the judicial power of Singapore exclusively in the Supreme Court and the Subordinate Courts, and not in any entity which is not a 'court' being, at common law, an entity with
D certain characteristics. The reference to 'court', in Article 93 would include any statutory body or tribunal having the characteristics of a court. All Commonwealth Constitutions appear to follow this practice of vesting the judicial power exclusively in the courts … In the Singapore context, the exclusivity of the judicial power is safeguarded by the provisions in Part VIII of the Singapore Constitution, which are designed to secure the
E independence of our judiciary.

[51] The conferment of judicial functions on bodies other than courts, thus understood, is an incursion into the judicial power of the Federation. As colourfully described by Abdoolcader SCJ in *Public Prosecutor v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311:
F

> …any other view would *ex necessitate rei* result in relegating the provisions of Article 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will.

G **[52]** It would be instructive to now distil the principles as have been illustrated above.

(i) Under art. 121(1) of the Federal Constitution, judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to Federal law. The courts will continually
H and inevitably be engaged in the interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system.

(ii) Judicial power in particular the power of judicial review, is an essential feature of the basic structure of the Constitution.

I

(iii) Features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment.

(iv) Judicial power may not be removed from the High Courts.

(v) Judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence.

Status Of Syariah Courts

[53] By way of comparison, in as much as the civil courts are ensconced within the Constitutional framework, Syariah courts are as yet non-existent, until such time when the State Legislature makes law to establish them, pursuant to the powers given it under item 1 of the List II (State List) in the Ninth Schedule of the Constitution. In other words, the status of Syariah courts is dependent on the State Legislature. As the Federal Court expressed in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101 (at paras. [29]-[33] (CLJ); paras. [32]-[33] (MLJ)):

> … The Legislature of a State may make law to set up or constitute the Syariah Courts in the State. Until such law is made such courts do not exist. The position is different from the case of the Civil High Courts, the Court of Appeal and the Federal Court. In the case of those civil courts, there is a whole Part in the Constitution (Part IX) with the title 'the Judiciary'.
>
> So the civil High Courts, the Court of Appeal and the Federal Court are established by the Constitution itself. But, that is not the case with the Syariah Courts. A Syariah Court in a state is established or comes into being only when the Legislature of the State makes law to establish it, pursuant to the powers given to it by item 1 of the State List. *In fact the position of the Syariah Courts, in this respect, is similar to the Sessions Courts and the Magistrates' Courts.* In respect of the last two mentioned courts, which the Constitution calls 'inferior courts,' Article 121(1) merely says, omitting the irrelevant parts:
>
> > 121(1) There shall be … such inferior courts as may be provided by federal law … (emphasis added)

[54] Article 74 of the Federal Constitution confers powers on the Legislature of a State to make laws, with respect to any of the matters enumerated in the State List or the Concurrent List. Of relevance to the present appeals is item 1 of the State List, which reads as follows:

> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic Law and personal and family law of persons professing the religion of Islam, including the Islamic Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, and non-charitable trusts; Wakafs and the

A definition and regulation of charitable and religions trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State: Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, B creation and punishment of offences by persons professing the religion of Islamic against precepts of that religion, except in regard to matters included in the Federal List; *the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect* C *of offences except in so far as conferred by federal law;* the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. (emphasis added)

D **[55]** The jurisdiction of Syariah courts must be provided for by the State Legislature within the limits of item 1; the courts do not have automatic jurisdiction over all the matters mentioned (see *Latifah* [43]), in that its jurisdiction must be expressly conferred by state legislations. In other words, the State must claim ownership over the subject matters that fall within the jurisdiction of the Syariah courts by providing for it expressly in its E legislation; because otherwise, the Syariah courts could be excluded from deciding on a subject matter which falls within item 1 of List II (State List) in the Ninth Schedule to the Federal Constitution. This is an important point which in the past had affected the full effect of the Syariah court's power when there is no express and clear provision enacted in the State Enactment. F A case in point is *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5; [1999] 1 MLJ 489. In that case, the Federal Court held that in the absence of any express provision (in the then Kedah Administration of Muslim Law Enactment 1962 conferring jurisdiction on the Syariah court to decide on questions of apostasy), the G **Syariah court has jurisdiction by implication**; the court held that this is to be inferred from the language of the relevant provisions of the State Enactments with regard to the conversion of Islam. (emphasis added)

[56] Speaking through Mohd Dzaiddin FCJ (as he then was) in *Soon Singh (supra)*, His Lordship said at (p. 21 (CLJ); p. 501 (MLJ)):

H From the analysis of the State Enactments, it is clear that all State Enactments and the Federal Territories Act contain express provisions vesting the syariah courts with jurisdiction to deal with conversion to Islam. On the other hand, only some State Enactments expressly confer jurisdiction on the syariah courts to deal with conversion out of Islam. In this regard, we share the view of Hashim Yeop A Sani CJ (Malaya) in I *Dalip Kaur* p 7 that '*clear provisions should be incorporated in all State Enactments to avoid difficulties of interpretation by the civil courts,' particularly in view of the new cl. (1A) of art 121 of the Constitution which as from 10 June 1988 had taken*

away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts. Be that as it may, in our opinion, the jurisdiction of the syariah courts to deal with the conversion out of Islam, although not expressly provided in the State Enactments, can be read into them by implication derived from the provisions concerning conversion into Islam. (emphasis added)

[57] The above view was approved in *Latifah Mat Zin (supra)*. The jurisdiction of the Syariah courts to determine a subject matter of a dispute must be expressly conferred by the State legislation.

[58] Coming back to the present appeals, the jurisdiction of the Syariah court is expressed under s. 50(3)(b) of the Administration of the Religion of Islam (Perak) Enactment (Perak Enactment):

(3) The Syariah High Courts shall:

(a) …

(b) in its civil jurisdiction hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions and proceedings relate to:

… …

(x) a declaration that a person is no longer a Muslim

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and

Thus, in the present appeals, the question is whether there is an express provision in the Perak Enactment conferring jurisdiction on the Syariah court to determine the validity of a person's conversion to Islam.

[59] The Court of Appeal, by majority answered this issue in the affirmative. It held that such powers are derived from the provisions of sub-ss. 50(3)(b)(x) and (xi) of the Perak Enactment. It held at [37] that:

Deliberating further on the issue of the jurisdiction of the Syariah Court, one has to look in the provisions of s. 50 of the Perak Enactment. Specifically, sub-ss. (3)(b)(x) and (xi) of s. 50 confers jurisdiction on the Syariah High Court.

A plain reading of the aforesaid provisions puts it beyond doubt that the power to decide the status of a Muslim person is within the exclusive jurisdiction of the Syariah High Court. The order of the High Court declaring that the conversion is null and void is a transgression of s. 50(3)(b)(x) of the abovesaid provision.

[60] Is this observation correct? Undoubtedly, s. 50 of the Perak Enactment is viewed as a specific provision, expressly conferring jurisdiction on the Syariah courts. It contains a list of subject matter that can be brought before the Syariah courts.

[61] However, our view is that s. 50(3)(b)(x) is not applicable to the facts of the present appeals. As is explicit, s. 50(3)(b)(x) specifically confers jurisdiction on the Syariah courts to issue a declaration that "a person is no longer Muslim". This would be applicable in a case where a person renounces his Islamic faith. But the issue in the present appeals concerns the *validity of the Certificates of Conversion issued by the Registrar of Muallafs in respect of the children's conversion to Islam.* If a finding is made by a court that a certificate (issued in respect of a person's conversion to Islam) is invalid, it can only mean that the said person has never at any time been a Muslim. Thus the question of him being 'no longer a Muslim' does not arise. (emphasis added)

[62] It is observed that, save for the determination of the faith of a deceased person (s. 50(3)(b)(xi) of the Perak Enactment), *nowhere is there any express provision in s. 50(3)(b) which confers jurisdiction on the Syariah Court to determine the validity of a person's conversion to Islam. Thus, the majority decision of the Court of Appeal had misdirected itself on the construction of s. 50(3)(b) of the Perak Enactment.* (emphasis added)

Syariah Court Judges

[63] Syariah Court Judges are appointed by the Rulers of the respective State after consultation with the relevant State Religious Council. Notably, Syariah courts are not constituted in accordance with the provisions of Part IX of the Federal Constitutions entitled "The Judiciary." The constitutional safeguards for judicial independence, including the mechanism for the qualifications, appointment, removal, security of tenure and remuneration of judges, do not apply in respect of Syariah courts.

[64] It is evident from the marked differences in the establishment and constitution of the civil and Syariah courts that the two courts operate on a different footing altogether (as was described in *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1; [2008] 2 MLJ 147 (at para. [23]). Thus the perception that both courts (civil courts and Syariah courts) should exercise a mutually reciprocal policy of non-interference (see *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 CLJ 707; [1999] 2 MLJ 241 at p. 246) may be somewhat misconceived and premised on an erroneous understanding of the constitutional framework in Malaysia.

[65] Clearly then, both cls. (1) and (1A) of art. 121 of the Federal Constitution illustrate the respective regimes in which each court operates. Thus issues of jurisdiction and conferment of powers in the civil courts and the Syariah courts are clearly drawn. What they (cls. (1) and (1A) art. 121 of the Federal Constitution) illustrate is that, both the civil and Syariah courts co-exist in their respective spheres, even if they are dissimilar in the extent of their powers and jurisdiction, in that the civil courts are possessed of powers, fundamental and intrinsic, as outlined in the Federal Constitution.

[66] In this it is emphasised that, if the relief sought by a plaintiff is in the nature of the "inherent powers" of the civil court (for example judicial review) or if it involves constitutional issues or interpretation of the law, then the civil courts would be seised with jurisdiction to determine the issue, regardless of its subject matter and especially if it comes within the scope and ambit of judicial powers as outlined above.

Limits On Jurisdiction Of Syariah Court

[67] The jurisdiction of the Syariah court is limited by the following:

(i) It may not exercise the inherent judicial powers of the civil courts including the power of judicial review;

(ii) It is confined to the persons and subject matters listed in the State List; and

(iii) It must be provided for under the relevant State legislation.

[68] It is not open for the Syariah courts to enlarge their own jurisdiction by agreements: "it is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction" (*Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150; [1983] 1 MLJ 175).

[69] Where the subject matter is within the purview of the Syariah court but the party appearing before it is not, the matter cannot be brought before the Syariah court. It is trite that the Syariah court has no jurisdiction over non-Muslim parties and non-Muslim parties have no *locus* before the Syariah court. The conundrum presented itself when one of the parties being a non-Muslim was highlighted in *Latifah (supra)*:

> … If one of the parties is not a Muslim such an application to the Syariah Court cannot be made. If the non-Muslim party is the would-be Plaintiff, he is unable even to commence proceedings in the Syariah Court. If the non-Muslim party is the would-be defendant, he would not be able to appear to put up his defence.

[70] Conversely, where the party appearing before the Syariah court is Muslim but the subject matter is not within the exclusive purview of the court, the Syariah court likewise has no jurisdiction over the matter. In *Sukma Darmawan (supra)*, the appellant was convicted by a civil court for sodomy, an offence under both Federal and Syariah law. The appellant contended that he ought to have been tried by the Syariah court, since the parties involved were Muslims and the offence was triable by the Syariah court. The Federal Court rejected the appellant's contention. In view of the jurisdiction conferred by law upon civil courts to try penal code offences, to exclude the jurisdiction of civil courts because the accused is a Muslim would lead to "grave inconvenience and absurd result."

[71] Islam is often understood as an all-embracing concept, consisting of 'not only the ritualistic aspect but also a comprehensive system of life.' In this vein, it has been suggested that the dichotomy between the private and public aspects of Islam is likely to give rise to legal difficulties (see Azahar Mohamed FCJ, *"The Impact of Parallel Legal Systems on Fundamental Liberties in Multi-Religious Societies"* Journal of the Malaysian Judiciary July [2016] JMJ 57). In fact, this dichotomy has long been resolved by the Federal Court in *Che Omar Che Soh v. Public Prosecutor* [1988] 2 MLJ 55. After tracing the history of British intervention in the Malay States, Salleh Abas LP summarised the notion of Islam as understood by the framers of the Constitution:

> … The religion of Islam became separated into two separate aspects, *viz* the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty … By ascribing sovereignty to the ruler, ie, to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat … Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state. The law was only applicable to Muslims as their personal law. Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only.

[72] It is clear therefore that the jurisdiction of the Syariah courts, in so far as the operation of Islamic law is concerned, is confined to the private aspect and does not extend to its public one. Ultimately the subject matter is one of personal rather than constitutional law; "constitutional law requires that the jurisdiction of the ordinary courts to rule finally on matters of legality should be preserved." (see *A Harding, Law, Government and the Constitution in Malaysia* (Kuala Lumpur: Malayan Law Journal, [1966] at 137).

Interpretation Of Article 121(1A)

[73] Thus we come to the crux of the matter at hand. As the issue in this case concerns the interpretation of art. 121(1A), in particular whether the clause has the effect of granting exclusive jurisdiction on the Syariah court in all matters of Islamic law including those relating to judicial review, a close scrutiny of the same is in order.

[74] In this regard, the Canadian approach offers a useful guide. A good starting point would be to take the position that art. 121(1A) must not be interpreted in isolation, but read together with other provisions such as art. 121(1) and against the backdrop of the principles underpinning the Constitution. As has been illustrated, civil and Syariah courts are distinct in

nature and status: the former established under the Federal Constitution and vested with inherent judicial powers; whereas the latter are creatures of State legislation under the State List, and akin to inferior tribunals.

[75] Parallels may be drawn with the scheme in Canada, where s. 96 provides for the appointment of judges to the courts of general jurisdiction. Section 92(14) allows provincial Legislatures exclusively to make laws in respect of the administration of justice in the provinces. The ambit and limits of s. 92(14) were considered by the Supreme Court in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (at paras. [25]-[27]):

> First, particular constitutional grants of power must be read together with other grants of power so that the constitution operates as an internally consistent harmonious whole. Thus section 92(14) does not operate in isolation. Its ambit must be determined, not only by reference to its bare wording, but with respect to other power conferred by the Constitution. In this case, this requires us to consider s. 96 of the Constitution Act, 1867.
>
> Second, the interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that 'flow by necessary implication from those terms:' *British Columbia v. Imperial Tobacco Canada Ltd* 2005 SCC 49, [2005] 2 SCR 473 at para 66, per Major J. *As this Court has recently stated, 'the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding and application of the text;' Reference re Senate Reforms* 2014 SCC 32 [2014] 1 SCR 704 para 26.
>
> It follows that in determining the power conferred on the province over the administration of justice, including the imposition of hearing fees, by s. 92(14), *the court must consider not only the written words of that provision, but how a particular interpretation fits with other constitutional powers and the assumptions that underlie the text.* (emphasis added)

[76] The significance of judicial review as part of basic structure as outlined in the previous paragraphs above are similarly countenanced in Canada, in that:

(i) Judicial power cannot be removed from the civil courts;

(ii) Judicial power cannot be conferred on another body which does not enjoy the same level of constitutional protection.

[77] In fact, Canadian courts have developed a two-part test in determining the constitutionality of an exclusive grant of jurisdiction to provincially-created court or tribunal. The test was outlined by the Supreme Court in *MacMillan Bloedel Ltd v. Simpson* [1995] 4 SCR 725 (at para. [9]):

A … I find that our jurisprudence on this question mandates a two-part analysis. After reviewing our s. 96 jurisprudence, therefore, I will first consider whether this grant of jurisdiction can be made and next consider whether the superior court's jurisdiction can be ousted. The first inquiry involves examining the nature of the contempt power; the second necessitates elaboration of the inherent jurisdiction of superior courts and
B recognition of their importance to our constitutional structure.

[78] We will now elaborate on the first stage.

STAGE 1: Grant of Jurisdiction to inferior court

The jurisdiction of a superior court cannot be vested in a body not
C constituted in accordance with the provisions protecting the independence of its judges. In *Toronto Corporation v. York Corporation* [1938] AC 415, the Privy Council considered whether the jurisdiction of a superior court can validly be vested in the Ontario Municipal Board, a creature of provincial legislation. Lord Atkin held (at 425-426):

D The first question touches a matter of first importance to the people of Canada. While legislative power in relation to the constitution, maintenance and organization of Provincial Courts of Civil Jurisdiction, including procedure in civil matters, is confided to the Province, *the independence of the judges is protected by provisions that the judges of the Superior, District, and County Courts shall be*
E *appointed by the Governor-General (s. 96 of the British North America Act, 1867), that the judges of the Superior Courts shall hold office during good behaviour (s. 99), and that the salaries of the judges of the Superior, District, and County Courts shall be fixed and provided by the Parliament of Canada (s. 100). These are three principal pillars in the temple of justice, and they are not to be undermined.* Is, then, the Municipal Board of Ontario a
F Superior Court, or a tribunal analogous thereto? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted. (emphasis added)

[79] The Privy Council clarified that an administrative body may be
G validly constituted for the purposes of administrative functions, but cannot receive judicial authority, but may nevertheless be validly constituted for the purposes of administrative functions (at p. 427):

It is difficult to avoid the conclusion that whatever be the definition given to Court of Justice, or judicial power, the sections in question do purport
H to clothe the Board with functions of a Court, and to vest in its judicial powers. But in making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. *It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail; It is not validly constituted to receive judicial authority so far, as the Act purports to constitute*
I *the Board a Court of Justice analogous to a Superior, District or Country Court it is pro tanto invalid*; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers: nor because the Province cannot give the judicial powers in question to any

court, for to a court complying with the requirements of ss. 96, 99 and 100 of the B.N.A. Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect. (emphasis added)

[80] A similar approach was adopted in Singapore. In *Mohammed Faizal (supra)* (at para. [17]) the High Court held that:

Although Article 93 of the Singapore Constitution sets out two different sources of judicial power, what is important to note for present purposes is that the specific wording used in *this Article has the effect of vesting the judicial power of Singapore exclusively in the Supreme Court and the Subordinate Courts and not in any entity which is not a 'court' being, at common law, an entity with certain characteristics.* The reference to "court" in Article 93 would include any statutory body or tribunal having the characteristics of a court. All Commonwealth Constitutions appear to follow this practice of vesting the judicial power exclusively in the courts. Reference may be made to the decision of the Privy Council in Hinds … *In the Singapore context, the exclusivity of the judicial power is safeguarded by the provisions in Part VIII of the Singapore Constitution which are designed to secure the independence of our judiciary.* (emphasis added)

STAGE 2: Ousting of core jurisdiction of Superior Court

[81] The core jurisdiction of the superior courts cannot be removed. (*MacMillan Bloedel (supra)* at para. [13]):

Essential historic functions of superior courts cannot be removed from those courts and granted to other adjudicative bodies to meet social policy goals if the resulting transfer contravenes our Constitution.

[82] In stage 2 of the analysis, the court must first consider the contents of the 'core' or 'inherent' jurisdiction of superior courts. Noting the historical basis of the Canadian system in the English judicial system, the Supreme Court in *MacMillan Bloedel* found that the superior courts of general jurisdiction are as much the cornerstone of the judicial system in Canada as it is in England. The court expressed strong approval for the elucidation of 'inherent jurisdiction' I H Jacob, *'The inherent jurisdiction of the Court'* (1970); 23 Current Legal Problem. (at [29]):

Regarding the basis of inherent jurisdiction Jacob states (at p.27):

… The jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent.' This description has been criticized as being 'metaphysical' [cite omitted] but I think nevertheless that it is apt, to describe the quality of this jurisdiction. *For the essential character of a superior court of law necessarily involves that it be invested with a power to maintain its authority and to prevent its process being obstructed and abused.*

A *Such a power is intrinsic in a superior court; it is its very life-blood, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.*

While inherent jurisdiction may be difficult to define, it is of paramount
B importance to the existence of a superior court. *The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its 'essential character' or 'immanent attribute.' To remove any part of this core emasculates the court, making it something other than a superior court.* (emphasis added)

[83] Thus laws impinging on or transferring out the core jurisdiction of
C superior courts have been held unconstitutional in a number of cases. These cases are helpfully summarised by in *Trial Lawyers Association of British Columbia* (at paras. [33]-[34]):

The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to
D transfer an aspect of the core jurisdiction of the Superior Court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act 1979* [1981] 1 SCR 714 *MacMillan Bloedel; Crevier v. Attorney General of Quebec* [1981] 2 SCR 220. *The thread throughout these cases is that laws may impinge on the core jurisdiction of the Superior Courts by denying access to the powers traditionally exercised by those courts.*

E *In Residential Tenancies, the law at issue unconstitutionally denied access to the Superior Courts, by requiring that a* certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the Superior Courts by imposing a privative clause excluding the supervisory jurisdiction of Superior Courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the
F superior courts for a segment of society – young persons – by conferring an exclusive power on youth courts to try youth for contempt in the face of superior courts. This court, per Lamer CJ, relied on *Crevier*, concluding that [it] establishes … that powers which are 'hallmarks of Superior Courts' cannot be removed from those courts. (*MacMillan Bloedel* at
G para 35). (emphasis added)

[84] Thus based on the principles distilled from the above discussion, the effect of art. 121(1A) in the Malaysian context can be outlined as follows:

(a) The Federal Constitution is premised on certain underlying principles. In a *Westminster* model Constitution, these principles include the
H separation of powers, the rule of law, and the protection of minorities.

(b) These principles are part of the basic structure of the Constitution. Hence, they cannot be abrogated or removed.

(c) The role of the civil courts as established by virtue of art. 121 is
I fundamental to these principles. The judicial power of the civil courts is inherent in the basic structure of the Constitution.

(d) Clause (1A) of art. 121 of the Federal Constitution recognises the power of the Syariah courts when it exercises its power within jurisdiction.

(e) Article 121(1A) must be interpreted against the background of the foundational principles and other provisions in the Constitution. A

(f) The Canadian two-stage test may be applied to determine whether art. 121(1A) can have the effect of granting jurisdiction to the Syariah courts in judicial review applications to the exclusion of the civil courts: B

(i) Applying stage 1 of the test, judicial power cannot be vested in the Syariah courts, because such courts are not constituted as a "superior court" in accordance with the constitutional provisions safeguarding the independence of judges in Part IX.

(ii) Applying stage 2 of the test, judicial power cannot be removed from the civil courts, because such powers are part of the core or inherent jurisdiction of the civil courts. C

(g) The present appeals arose from an application for judicial review of the administrative actions of an executive body (the Registrar of Muallafs) in exercise of its statutory powers (under the Perak Enactment). Regardless of the label that may be applied to the subject matter, the power to review the lawfulness of executive action rests solely with the civil courts. D

[85] Therefore, viewed in its proper constitutional context, the effect of art. 121(1A) on the jurisdiction of the civil courts is apparent. Article 121(1A) should not be dismembered and then interpreted literally and in isolation of, but construed together with, art. 121(1), for a construction consistent with the smooth working of the system (see *Sukma Darmawan (supra)*). E

[86] Thus the amendment inserting cl. (1A) in art. 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Syariah courts. More importantly, Parliament does not have the power to make any constitutional amendment to give such an effect; it would be invalid, if not downright repugnant, to the notion of judicial power inherent in the basic structure of the Constitution. The purport and effect of art. 121(1A) is eloquently explained by *Harding (supra)* as follows: F G

> The amendment does not purport to oust the jurisdiction of the High Court to review decisions of the Syariah Courts. It merely says, in effect, that the ordinary courts cannot exercise the Syariah Court's jurisdiction, a position which it should be noted, applies to any inferior jurisdiction; it is indeed a cardinal principle of judicial review that the court cannot substitute its decision for that of the inferior jurisdiction whose decision is reviewed. It does not therefore seem possible that the Syariah Courts, by this small amendment, have been converted into a totally separate legal system … As things stand the civil courts exercise the power of judicial review and this is of course part of the judicial power. Nothing in clause 1A attempts to interfere with this proposition … For these reasons it seems that clause 1A was enacted for the avoidance of doubt. It seeks to ensure that decisions made within jurisdiction by the Syariah Courts H I

A are not reversed by the civil courts. *The qualification 'made within jurisdiction' is important; the ordinary courts can still decide whether a given decision is within jurisdiction, just as they can with any inferior court. In this sense the primacy of the civil courts has not been disturbed.* (emphasis added)

[87] The operation of art. 121(1A) in practice illustrates this proposition. B Clause (1A) does not remove the jurisdiction of civil courts where constitutional interpretation is concerned. Per Abdul Hamid Mohamed FCJ in *Latifah (supra)*:

> "Interpretation of the Federal Constitution is a matter for this court, not the syariah court." This is the case even where the determination of C Islamic law is required for the purpose of such interpretation, as firmly reiterated by the Federal Court in A*bdul Kahar b. Ahmad v. (Kerajaan Malaysia, intervener) and Anor* [2008] 2 MLJ 617:
>
> > Nowhere in the Constitution does it say that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of D the Syariah Court to do. The jurisdiction of Syariah Courts are confined to the limited matters enumerated in the State List and enacted by the respective state enactments …
> >
> > Nowhere in the Constitution is there a provision that the determination by Islamic law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make E law to grant such jurisdiction to the Syariah Court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to Syariah Courts. In fact, it cannot be done.

[88] In *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585, Richard Malanjum Chief Judge Sabah F and Sarawak expressed a similar view in his dissenting judgment:

> Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing Art 121(1A). In my view the said article only protects the G Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Constitution. Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function.

[89] Clause (1A) also does not remove the jurisdiction of civil courts in the H interpretation of legislation. This is the case even in relation to legislation enacted for the administration of Muslim law, as was held in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1:

> The new cl. 1A of art. 121 of the Constitution effective from 10 June 1988 I has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of muslim law … *If there are*

clear provisions in the State Enactment the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment. (emphasis added)

[90] Neither does cl. (1A) exclude the jurisdiction of civil courts in determining the constitutionality of State legislation for the establishment of Syariah courts. Where State laws infringe on matters within the Federal List in the Constitution, the Federal Court explained in *Latifah* (at para. [90]) that:

In such a situation the civil court will be asked to apply the provision of cl. (1A) of art. 121 to exclude the jurisdiction of the civil court. *The civil court should not be influenced by such an argument. Clause (1A) of art 121 was not introduced for the purpose of ousting the jurisdiction of the civil courts.* The question to be asked is : Are such laws constitutional in the first place? And the constitutionality of such laws are a matter for the Federal Court to decide – Article 128. (emphasis added)

[91] Further, cl. (1A) does not prevent civil courts from continuing to exercise jurisdiction in determining matters under Federal law, notwithstanding the conversion of a party to Islam. The Federal Court in *Subashini (supra)* and recently in *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505; [2016] 1 MLJ 585 confirmed the jurisdiction of civil courts in determining divorce and custody matters under the LRA in relation to parties who contracted a civil marriage but one of whom has since converted to Islam.

[92] As the above authorities demonstrate, the approach that art. 121(1A) excludes or oust the jurisdiction of civil courts (see for instance *Subashini* (at para. [23]) and *Mohd Habibullah Mahmood v. Faridah Dato' Talib* [1993] 1 CLJ 264; [1992] 2 MLJ 793 (at 800), is flawed. Article 121(1A) does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. The inherent judicial power of civil courts in relation to judicial review and questions of constitutional or statutory interpretation is not and cannot be removed by the insertion of cl. (1A).

[93] The confusion as to the purport of art. 121(1A) has now been laid to rest by the lucid pronouncement of Raus Sharif PCA (as His Lordship then was) in *Viran (supra)*:

It is clear that art. 121(1A) was introduced not for the purpose of ousting the jurisdiction of the civil courts. It was introduced in order to avoid any conflict between the decision of the Syariah Courts and the civil courts which had occurred in a number of cases before.

Issue Of Conversion

[94] At the risk of repetition, it has been shown that there have been instances where the Federal Court has held that questions of conversion and the determination of whether a person is a Muslim or not fall under the exclusive jurisdiction of the Syariah court. In *Soon Singh (supra),* the State

Legislation in question conferred jurisdiction on the Syariah courts to adjudicate on matters relating to conversion to Islam. The court held that conversion out of Islam (apostasy) could be read also to fall within the jurisdiction of the Syariah courts by necessary implication, on the basis that:

> … the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with hukum syarak *(Dalip Kaur)*. As in the case of conversion to Islam, certain requirements must be complied with under hukum syarak for a conversion out of Islam to be valid, which only the Syariah Courts are the experts and appropriate to adjudicate. In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the Syariah Court, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.

[95] The notion that conversion out of Islam falls within the jurisdiction of Syariah courts was reiterated by the majority in *Lina Joy*. By an originating summons, the plaintiff, who had renounced Islam for Christianity applied to the High Court for various declaratory orders on the basis of cl. (1) of art. 11 of the Federal Constitution, which guarantees to every person 'the right to profess and practise his religion'. The plaintiff also sought an order that the Director-General of the National Registration Department enters her name in the registry book as having converted out of Islam.

[96] The majority in *Lina Joy* held that apostasy was within the jurisdiction of the Syariah court. The majority also took the view that common sense dictates that a person professing a particular religion would be bound by the laws and practices of that religion, including in its renunciation. However, the court made no final determination on whether the appellant was a Muslim or not; the court held that the jurisdiction of the Syariah court cannot be excluded on the grounds that such jurisdiction extends only to those professing the religion of Islam.

[97] Premised on the above authorities, the Federal Court in *Hj. Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal* [2014] 4 CLJ 253; [2014] 3 MLJ 757 reaffirmed that 'it is settled law that the question of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah court.'

[98] In essence, the position taken in *Siti Hasnah (supra)* is that since matters of conversion involve Islamic law and practice, which are areas within the Syariah court's expertise, it must follow that the Syariah courts must have jurisdiction over such matters to the exclusion of civil courts. With respect, this approach is unduly simplistic. It ignores the broader constitutional context in which art. 121(1A) is framed. It is worth reiterating that the effect of art. 121(1A) is not to oust the jurisdiction of the civil courts as soon as a subject matter relates to the Islamic religion. The powers of judicial review and of constitutional or statutory interpretation are pivotal constituents of the

civil courts' judicial power under art. 121(1). Such power is fundamentally inherent in their constitutional role as the bulwark against unlawful legislation and executive action. As part of the basic structure of the Constitution, it cannot be abrogated from the civil courts or conferred upon the Syariah courts, whether by constitutional amendment, Act of Parliament or State legislation.

[99] We take a firm stand on this – in that before a civil court declines jurisdiction premised on the strength of art. 121(1A), it should first examine or scrutinise the nature of the matter before it. If it involves constitutional issues, it should not decline to hear merely on the basis of no jurisdiction.

The Present Appeals

[100] We now turn again to the facts of the present appeals. The appellant's application is for judicial review of the actions of the Registrar of Muallafs in issuing the Certificates of Conversion, on the basis that the certificates were *ultra vires*, contrary to, or inconsistent with certain provisions in:

(i) The Perak Enactment;

(ii) The Guardianship of Infants Act 1961; or

(iii) The Federal Constitution

[101] It is not disputed that the Registrar of Muallafs was exercising a statutory function as a public authority under the Perak Enactment in issuing the said certificates. As had been clearly manifested earlier, the jurisdiction to review the actions of public authorities, and the interpretation of the relevant State or Federal legislation as well as the Constitution, lie squarely within the jurisdiction of the civil courts. This jurisdiction, which constitutes the judicial power essential in the basic structure of the Constitution, is not and cannot be excluded from the civil courts and conferred upon the Syariah courts by virtue of art. 121(1A).

[102] We need to emphasise this. *That the determination of the present appeals does not involve the interpretation of any Islamic personal law or principles.* This has to be made clear. The yardstick to determine the validity of the conversion is the administrative compliance with the express conditions stated in ss. 96 and 106 of the Perak Enactment, namely the utterance of the Affirmation of Faith (the Kalimah Syahadah) and the consent of the parent. *The subject matter in the appellant's application is not concerned with the status of her children as Muslims converts or with the questions of Islamic personal law and practice, but rather with the more prosaic questions of the legality and constitutionality of administrative action taken by the Registrar in the exercise of his statutory powers.* This is the pith of the question at hand. (emphasis added)

[103] Since the appellant is a non-Muslim and so has no *locus* to appear before the Syariah court for the present application, the matter is now before us, seeing as the Syariah court does not have the power to expand its own jurisdiction to choose to hear the appellant's application.

[104] In these circumstances and in view of the views expressed, we have no difficulty in concluding that the High Court is seised with jurisdiction, to the exclusion of the Syariah court, to hear the matter, and has rightly done so. Thus the first question is answered in the affirmative.

Question 2

[105] The second question is repeated here for convenience and it reads:

> Whether a child of a marriage registered under the Law Reform (Marriage & Divorce) Act 1976 ('a civil marriage') who has not attained the age of eighteen years must comply with both sections 96(1) and 106(b) of the administration of the Religion of Islam (Perak) Enactment 2004 (or similar provisions in State law throughout the country) before the Registrar of Muallafs or his delegate may register the conversion to Islam of that child.

Proceedings In The Courts Below

[106] The High Court held that it had jurisdiction to interpret State Enactments, even those relating to the administration of Muslim law. The learned JC declared that the requirements in ss. 96 and 106 of the Perak Enactment must be complied with by the Registrar of Muallafs in issuing the Certificates of Conversion. On the facts, it was undisputed that the appellant's children were not present before the Registrar and did not utter the two clauses of the Affirmation of Faith (the Kalimah Syahadah) as required under s. 96. The learned JC expressed that the repeated non-compliance with the requirement of presence to utter the Affirmation of Faith does not make such non-compliance proper. Section 101(2), which states that the certificate shall be conclusive proof of the fact stated therein, was held not to oust the jurisdiction of the court where there is patent non-compliance with the statutory requirements.

[107] The Court of Appeal took a contrary view on this point. Having found that the issue of the validity of conversion fell within the jurisdiction of the Syariah court, the Court of Appeal held that the High Court had no power to question the decision of the Registrar of Muallafs or to consider the Registrar's compliance with the requirements in ss. 96 and 106 of the Perak Enactment. Reference was made to the powers of the Registrar in registering Muallafs (Muslim converts) under s. 100, and the conclusiveness of the Certificates of Conversion as proof of the facts stated in s. 101(2). The Court of Appeal took the position that the fact that a person has been registered in the Register of Muallafs as stated in his Certificate of Conversion is proof that the conversion process had been done to the satisfaction of the Registrar.

Submissions In The Federal Court

[108] It was submitted by learned counsel for the appellant that the only possible interpretation of ss. 96 and 106 of the Perak Enactment is that both sections must be complied with, in order for a valid Certificate of Conversion to be issued for children of non-Muslim marriages. The undisputed evidence is that the conditions in s. 96 were not fulfilled in this case, and that the Registrar had also failed to require the appellant's children to be present before him under s. 100. In the circumstances, it was argued that the decision of the Registrar of Muallafs was thus *ultra vires* the Enactment and the certificates issued ought to be quashed. Learned counsel further added that sub-s. 101(2) of the Enactment does not oust the court's jurisdiction in this case; the 'conclusive evidence clause' applies only where the certificate has been issued lawfully.

[109] The submissions by the learned State Legal Adviser and the learned Senior Federal Counsel on this question are broadly similar and may be outlined as follows. Section 96 of the Perak Enactment is a general provision for conversion into Islam. Subsection 106(b) is the specific provision applicable for the conversion of persons under the age of 18, for which the written consent of the parent or guardian will suffice. Further, the conclusiveness of the Certificate of Conversion issued by the Registrar is provided under sub-s. 101(2) of the Enactment. Since the certificate states that the persons named therein have been converted and entered in the Register of Muallafs, it follows that the process of conversion must have been done to the satisfaction of the Registrar. Any challenge to the certificates would amount to a transgression into the issue of the validity of the conversion, which lies within the exclusive jurisdiction of the Syariah court.

[110] On behalf of the appellant's husband, learned counsel reiterated the view that the civil High Courts do not have jurisdiction to question the validity of the Certificates of Conversion, for it is the Syariah court that has exclusive jurisdiction to decide the status of a person as a Muslim. According to counsel's submissions, the issue should be brought before the Syariah court, and persons not subject to the compulsive authority of the Syariah court are not precluded from trying to obtain relief from the court.

The Perak Enactment

[111] We have explained that the civil High Court is vested with jurisdiction to the exclusion of the Syariah courts in the present case, for reasons elaborated in the above section. We will now deal with the remaining issues of whether both ss. 96 and 106(b) must be complied with for the conversion of children, and whether s. 101(2) of the Perak Enactment has the effect of excluding the High Court's power to review the issuance of the Certificates of Conversion by the Registrar of Muallafs.

[112] The relevant provisions in the Perak Enactment are these. Section 100 provides for the power of the Registrar in respect of the registration of Muallafs:

Registration Of Muallafs

100(1) A person who has converted to the religion of Islam may apply to the Registrar in the prescribed form for registration as a muallaf.

(2) If the Registrar is satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, the Registrar may register the applicant's conversion to the religion of Islam by entering in the Register of Muallafs the name of the applicant and other particulars as indicated in the Register of Muallafs.

(3) …

(4) …

(5) If the Registrar is not satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, he may permit the applicant to utter, in his presence or in the presence of any of his officers, the two clauses of the Affirmation of Faith in accordance with the requirements of that section.

[113] In registering an applicant's conversion to Islam, the Registrar must first be satisfied that the requirements of s. 96 have been fulfilled (s. 101(2)), otherwise the Registrar may permit the applicant to utter the Affirmation of Faith in accordance with the requirements of that section (s. 100(5)). The requirements for a valid conversion are prescribed in s. 96 as follows:

Requirement For Conversion To The Religion Of Islam

96(1) The following requirements shall be complied with for a valid conversion of a person to Islam:

a) The person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;

b) At time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean "I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah;" and

c) The utterance must be made of the person's own free will.

(2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the 2 clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (b) of the subsection.

[114] Section 106 provides additional conditions for the conversion of persons under the age of 18:

Capacity To Convert To The Religion Of Islam

106. For the purpose of the Part, a person who is not a Muslim may convert to the religion of Islam if he is of sound mind and:

(a) has attained the age of eighteen years; and

(b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.

[115] The issuance and the effect of the Certificate of Conversion issued by the Registrar of Muallafs are set out in s. 101:

Certificate Of Conversion To The Religion Of Islam

101(1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.

(2) A Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

Legal Limits Of Statutory Power

[116] The Registrar of Muallafs is appointed by the Majlis Agama Islam, a body corporate established pursuant to the Perak Enactment, to maintain the Register of Muallafs (s. 99 of the Perak Enactment). The issuance of Certificates of Conversion by the Registrar is an exercise of a statutory power under the Enactment. At the outset, it is axiomatic that any exercise of legal power, including discretionary power, is subject to legal limits. In the celebrated pronouncement of Raja Azlan Shah CJ (as His Royal Highness then was) in *Pengarah Tanah Dan Galian, Wilayah Persekutuan supra* (at p. 148):

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen; so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place,' (per Danckwertts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434 442).

[117] In that case, the Federal Court held that the Land Executive Committee, being a creature of statute, possess only such power as conferred by Parliament; "therefore when a power vested in it is exceeded any act done in excess of the power is invalid as being *ultra vires*" (at p. 148).

[118] Thus it is clear to us that the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts. If an exercise of power under a statute exceeds the four corners of that statute, it would be *ultra vires* and a court of law must be able to hold it as such (see the Singapore Court of Appeal decision in *Chng Suan Tze v. Minister for Home Affairs & Ors & Other Appeals* [1988] SLR (R) 525 at para. [86]. In *Tan Seet Eng (supra)* Sundaresh Menon CJ in the Singapore Court of Appeal discussed the legal limits of power (at para. [1]):

> However, one of its core ideas (of the Rule of Law) is the notion that the power of the state is vested in the various arms of government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there is no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the *Westminster* model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits.

Ouster Of Jurisdiction

[119] Section 101 of the Perak Enactment operates as a finality clause. It declares that the decision of the Registrar of Muallafs is final.

[120] The power of the Judiciary to ensure the legality of executive action is consistent with its constitutional role in a framework based on the separation of powers, which as discussed above, forms the basic structure of the Constitution. As civil courts are courts of general jurisdiction, the exclusion of their jurisdiction is not to be readily inferred. The Federal Court held in *Metramac Corp. Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113 (at para. [17] (CLJ); para. [36] (MLJ)):

> The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the state.

[121] Indeed, the courts have adopted a robust approach in reviewing the legality of decisions by public authorities even in the face of express ouster clauses. The *locus classicus* in this regard is *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, wherein the House of Lords held that an ouster clause in the Foreign Compensation Act 1950 did not preclude the courts from reviewing the decisions of the Foreign Compensation Commission on the basis of jurisdiction. An authority would be stepping outside its jurisdiction in various ways, for instance where the conditions precedent to jurisdiction were not fulfilled, or where the tribunal took into account matters which it was not directed to take into account. Any such lack of jurisdiction would cause the purported decision of the authority to be a nullity. Per Lord Pearce (at pp. 194-195):

> Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. *It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of it's mandate to inquire and decide as set out in the Act of Parliament.* Again, if its instructed to give relief wherever on inquiry it finds that two stated conditions are satisfied, it cannot alter or restrict its jurisdiction by adding a third condition which has to be satisfied before it will give relief. *It is therefore, for the courts to decide the true construction of the statute which defines the area of a tribunal's jurisdiction.* This is the only logical way of dealing with the situation and it is the way in which the courts have acted in a supervisory capacity. (emphasis added)

[122] The approach in *Anisminic* has been adopted by the Federal Court. The case of *Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 2 CLJ 6; [1984] 1 CLJ (Rep) 155; [1984] 1 MLJ 363 concerned the effect of s. 33B(1) of the Industrial Relations Act 1967, which states in no uncertain terms that "the decision of the (Industrial) Court to grant or not to grant an application under s. 33A(1) shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any court." The Federal Court nevertheless held the clause not to preclude the High Court's power of judicial review (at p. 157 (CLJ); p. 368 (MLJ)):

> It is common ground that such a clause will not have the effect of ousting the inherent supervisory power of the High Court to quash the decision by *certiorari* proceedings if the Industrial Court has acted without jurisdiction or in excess of the limits of its jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.

[123] So too in the case of *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337, the Federal Court held that judicial review was not precluded by the privative or ouster clause in s. 9(6) of the Industrial Relations Act 1967, which states that "A decision of the Minister under sub-s. (5) shall be final and shall not be questioned in any court." The position is succinctly put by Wade and quoted with approval by the Federal Court (at p. 490 (CLJ); p. 355 (MLJ)):

> The last word on the question of legality rests with the courts and not with the administration.

The Present Appeals

[124] The legal limits of the Registrar of Muallafs' statutory power to issue Certificates of Conversion are prescribed in the Perak Enactment. From a plain reading of the relevant sections, the requirements in s. 96 and s. 106 are cumulative: both must be complied with. Section 96 is phrased in mandatory terms, spelling out the requirements that "shall be complied with for a valid conversion of a person to Islam." Nowhere in that section or

anywhere else in the Perak Enactment was it suggested that the s. 96 requirement may be dispensed with for any category of applicants; nor does the Enactment confer any discretion upon the Registrar of Muallafs to dispense with the requirement in respect of an applicant under the age of 18. In fact, the provisions of s. 100 sets out the procedure clearly: if the s. 96 requirement is fulfilled in respect of an applicant, he may proceed to register the applicant's conversion; if s. 96 is not fulfilled, he may permit the applicant to utter the two clauses of the Affirmation of Faith in his presence or that of his officers, "in accordance with the requirements of that section," ie, to ensure that s. 96 is fulfilled.

[125] The undisputed evidence is that the appellant's children did not utter the two clauses of the Affirmation of Faith and were not present before the Registrar of Muallafs before the Certificate of Conversion was issued. The requirement in s. 96(1) has not been fulfilled. The issuance of the certificates despite the non-fulfilment of the mandatory statutory requirement is an act which the Registrar had no power to do under the Enactment. In so doing, the Registrar had misconstrued the limits of his power and acted beyond its scope. In this regard, the minority judgment in the appeals (per Hamid Sultan JCA) gave a strong dissent.

[126] In our view therefore, *based on the principles in Anisminic (supra), the lack of jurisdiction by the Registrar renders the certificates issued a nullity. Section 101(2) cannot have the effect of excluding the court's power of judicial review over the Registrar's issuance of the certificate. It is settled law that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause.* It would be repugnant to the rule of law and the judicial power of the courts if the Registrar's decision is immune from review, even in light of uncontroverted facts that the Registrar had no jurisdiction to make such a decision. (emphasis added)

[127] In any case, the language of s. 101(2) itself does not purport to oust judicial review. The section merely states that a Certificate of Conversion to the religion of Islam shall be conclusive proof of the facts stated therein. The facts stated in the certificate are that the persons named have been converted to the religion of Islam, and that their names have been registered in the Register of Muallafs. In the instant appeals, the facts of the conversion or the registration of the appellant's children are not challenged. What is challenged is the legality of the conversion and registration.

[128] At this point, it may be instructive to note that Islam enjoins two fundamental principles:

(i) Al Adl Justice

(ii) Al Syura Consultation

There was no consultation if the reverting parent has absolute right to change the original religion of the children without consulting the non-reverting parent.

[129] Due process of justice will only be upheld if both parents are given the right to be heard by a single competent authority.

[130] The reverting parent should demonstrate true Islamic character and sincere *niyyat* for conversion, hence children or the non-converting spouse will be attracted to the *Deen* without duress or coercion.

[131] The respondents have cited the Court of Appeal decision in *Saravanan Thangathoray v. Subashini Rajasingam & Another Appeal* [2007] 2 CLJ 451; [2007] 2 MLJ 705 in support of their contention that s. 101(2) precludes the court from reviewing the Registrar's issuance of the certificate. Pursuant to s. 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, which is equipollent with s. 101(2) of the Perak Enactment, the Court of Appeal held that the date of the husband's conversion stated in the certificate has been conclusively determined. As such, it is not open for the civil court to question the date stated.

[132] However, the Court of Appeal decision on this point failed to be affirmed on appeal to the Federal Court. In *Subashini (supra)*, the Federal Court, in considering the conclusiveness of the date of conversion as stated in the certificate, highlighted the absence of evidence pointing against the date of the husband's conversion (at para. [69]):

> There is nothing in the evidence to warrant even a suspicion that the PERKIM certificates were issued fraudulently, in that, for example, the husband and Dharvin did not convert at PERKIM Headquarters as stated in the Certificates, or that the conversion was not on 18 May 2006, or that the husband, after knowing of the wife's petition dated 4 August 2006, in order to ensnare the wife in the proviso to s. 51(1), contrived to have PERKIM and the Registrar of Muallafs create evidence that he had converted on 18 May 2006. The evidence must be taken at its face value as genuine and as good evidence of the conversion of the husband on 18 May 2006.

[133] The present appeals are easily distinguishable from the facts of *Subashini (supra)*. As explained above, the crux of the appellant's challenge is against the legality of the Registrar's act in issuing the Certificate of Conversion, not the facts stated in the certificate. Further, there is uncontroverted evidence that the requirement in s. 96 was not complied with in respect of the applicant's children prior to their conversion. In these circumstances, the contention that since the certificate conclusively states that the Registrar had registered the conversion of the children, the process of conversion must have been done to the satisfaction of the Registrar in accordance with the Enactment, is untenable at best.

[134] Nevertheless, the Federal Court in *Subashini (supra)* went on to hold that despite s. 112(2), the wife is not precluded from establishing a different date for the husband's conversion (at paras. [70]-[71]):

> But what s. 112(2) of the Selangor Enactment says is that the Certificate of Conversion "shall be conclusive proof of the facts stated in the Certificate." It means that the fact stated in it that the husband converted to Islam on 18 June 2006 cannot be disputed. But it does not mean that it cannot be shown that although on 18 June 2006 the husband converted to Islam, presumably in a formal ceremony at PERKIM in the presence of witnesses, he had even earlier converted to Islam by reciting the Affirmation of Faith in accordance with s. 107.
>
> I therefore feel that, despite appearances from the submissions, this court ought not to decide the question of the date of conversion as a matter of choice between the two dates and that the wife ought to be given a chance in the trial of the petition to prove her belief that the husband had converted to Islam in February 2006 or earlier.

[135] As such, the respondent's reliance on s. 101(2) of the Perak Enactment and the Court of Appeal decision in *Saravanan* is wholly misconceived. For the reasons stated above, we answer the second question in the affirmative.

Question 3

[136] The third question in these appeals reads as follows:

> Whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a Certificate of Conversion to Islam can be issued in respect of that child?

Proceedings In The Courts Below

[137] The High Court considered the constitutionality of the conversion of a child to civil marriage to Islam by a converted parent without the consent of the other non-converting parent. The word 'parent' in the English version of art. 12(4) is understood by the learned JC to cover both father and mother, for "it envisages and enjoins parents to act as a united whole in unison." The learned JC opined that sense and sensibility require that where parents cannot agree on the child's religious upbringing, the *status quo* should be maintained until the child reaches the age of majority. However, the learned JC held that he was bound by the *obiter* statements of the Federal Court in *Subashini* to the effect that under art. 12(4) either parent has the right to convert a child to the marriage to Islam.

[138] The High Court preferred an interpretation of art. 12(4) and the Perak Enactment which is consistent with the other fundamental provisions in the Constitution, namely arts. 5, 8 and 11. On the learned JC's view, the interpretation of art. 12(4) should also be consistent with international norms and conventions vesting equal rights in both parents, such as the Universal Declaration of Human Rights (UDHR), the Convention of the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of

Discrimination against Women (CEDAW). It was concluded that the unilateral conversion of minor children to Islam by one parent without the consent of the other is unconstitutional. By depriving the appellant and her children of the right to be heard prior to the conversion, the conversion was in breach of natural justice.

[139] The decision of the High Court on this point was reversed by the Court of Appeal. Following the Federal Court decision in *Subashini* which involved a similar complaint, the Court of Appeal held that the word 'parent' in art. 12(4) means a single parent. Article 12(4), the Court of Appeal explained, must not be read as entrenching the right to a child's choice of religion in both parents, and the exercise of one parent's right thereunder does not mean a deprivation of another parent's right to profess and practice their religion under art. 11. With regard to international norms and convention, the Court of Appeal emphasised that such conventions do not form part of the local law unless incorporated. According to the Court of Appeal, it was not for the court to pervert the language of the Constitution in favour of any legal or constitutional theory, or to determine whether an Act contravenes principles of international law.

Submissions In The Federal Law

[140] Learned counsel for the appellant submitted that a purposive reading of s. 106(b) of the Perak Enactment should be preferred. The section, it was submitted, should be interpreted in the context of the Federal Constitution, the Guardianship of Infants Act 1961 and international conventions. Counsel argued that the word 'parent' in art. 12(4) should be read with the Eleventh Schedule of the Constitution, which provides for singular terms to include the plural. Articles 3, 5, 8 and 11 were asserted to contain the right of a mother to withhold her consent to a unilateral change in her child's religion. Counsel also referred to ss. 5 and 11 of the Guardianship of Infants Act, which provided for equal guardianship rights between parents. In the circumstances, it was argued that the words 'ibu atau bapa' in s. 106(b) of the Perak Enactment should be read to require both parents' consent for the conversion of a child. The Federal Court is urged to depart from the decision in *Subashini*.

[141] The respondents assert the right of one single parent to convert a child. Common points were raised by learned counsel for the respondents; art. 12(4) uses the word 'parent' in a singular sense, and has been interpreted as such by the Federal Court in a number of cases including *Subashini*. In addition, the learned State Legal Adviser noted that the national language translation of art. 12(4) refers to 'ibu atau bapa' in the singular and contended that the national language version is the authoritative text pursuant to art. 160B. The learned State Legal Adviser and learned counsel for the appellant's husband further submitted that art. 8 is not violated, for the right to convert the child applies whether the converting spouse is the husband or

A the wife. It was also contended that reliance cannot be placed on the Guardianship of Infants Act, which is expressly prohibited from application to Muslims.

[142] The central contention in relation to this question involves around the interpretation of art. 12(4) of the Federal Constitution. The English version B of art. 12(3) and (4) read as follows:

> Article 12(4) of the Federal Constitution
>
> 12. Right in respect of education
>
> (1) …
>
> C (2) …
>
> (3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.
>
> (4) For the purposes of Clause (3) the religion of a person under the D age of eighteen years shall be decided by his **parent** or guardian. (emphasis added)

[143] The pertinent provision in the Eleventh Schedule, read together with art. 160(1), provides that in interpreting the Constitution:

> E Construction of singular or plural:
>
> words in the singular include the plural, and words in the plural include to singular.

[144] Applying the guide to interpretation to art. 12(4), the position is fairly clear: the singular word 'parent' includes the plural 'parents.' The religion F of the minor child is to be decided by his 'parent' or 'parents' as the case may be.

[145] However, the formulation in art. 12(4) is differently worded in the national language translation of the Federal Constitution, which reads as follows:

G
> (4) Bagi maksud Fasal (3) agama seseorang yang di bawah umur lapan belas tahun hendaklah ditetapkan oleh **ibu atau bapanya** atau penjaganya. (emphasis added)

[146] The phrase 'ibu atau bapa' or 'his father or mother' denotes a parent H in the singular, and appears to preclude an interpretation requiring the religion to be determined by both father and mother. In light of the apparent inconsistency between the Bahasa Malaysia and English version of art. 12(4), it was contended that the former is authoritative and prevails over the latter pursuant to art. 160B of the Constitution. Article 160B states:

I

160B. Authoritative text

Where this Constitution has been translated into the national language, **the Yang di-Pertuan Agong may prescribe such national language text to be authoritative,** and thereafter if there is any conflict or disagreeing between such national language text and the English language text of this Constitution, the national language text shall prevail over the English language text. (emphasis added)

[147] The High Court held that since the requisite prescription of the national language version under art. 160B above has not been effected, the authoritative or official text is the English version. The learned JC observed that the Senior Federal Counsel had not submitted otherwise. In the present appeals, despite the learned State Legal Adviser's reliance on art. 160B, no evidence of the necessary prescription was adduced by either of the respondents. In the circumstances, we will proceed on the basis that the English version to be authoritative.

[148] Much emphasis has been placed on the literal meaning of the singular noun 'parent' in art. 12(4). The interpretive guide in the Eleventh Schedule aside, it must be recalled that the provisions of the Constitution are not to be interpreted literally or pedantically. The principles of constitutional interpretation were lucidly summarised by Raja Azlan Shah LP in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29 (at 32):

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. *Secondly, a constitution, being a living piece of legislation, its provision must be construed broadly and not in a pedantic way* – 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21). A constitution is *sui generis,* calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. (emphasis added)

[149] This is particularly so in respect of art. 12(4), which falls under the fundamental liberties section in Part II of the Constitution. As was held in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301:

… The Constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. *On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights.* In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. (emphasis added)

[150] It is against the backdrop of these principles that we consider the true construction of art. 12(4).

Parental Rights Over Children

[151] A useful summary of the history of parents' rights over their children was given by Lord Guest in *J v. C* [1970] AC 668 (at 692-696). In what can only be described as an illuminating review of the English authorities since 1848, Lord Guest found that the rights of the father were initially predominant. The court was not to interfere with the 'sacred right of the father,' save in exceptional circumstances where the father has shown himself unfit to exercise them (*In re Agar-Ellis* [1883] 24 Ch D 317). The welfare of the infant was a subsidiary consideration; in having regard to the benefit to the infant, the court was mindful of the "natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can" (*In re Curtis* [1859] 28 LJ Ch 458).

[152] The rights of the mother began to be recognised with the passing of the Guardianship of Infants Act 1886, under which the mother is given equal rights as the father, and the welfare of the infant given a preferential position enshrined in statute. Subsequently, under the Custody of Children Act 1891, courts would interfere with the rights of the parents in the interests of the welfare of the child. Attitudes have shifted; "the welfare of the child is becoming as important as the rights of the parents."

[153] The concept of welfare was explained by Lindley LJ in *In re McGrath (Infants)* [1893] 1 Ch 143:

> The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

[154] Lord Guest noted that by 1925, the Guardianship of Infants Act negated any claim that the rights of either parent is superior to that of the other, and provided that the welfare of the infant shall be regarded as the first and paramount consideration.

[155] The paramountcy of the child's welfare applies in cases involving custody or religious upbringing. The case of *Re: T (minors), custody: religious upbringing* [1975] 2 FLR 239 involved the religious upbringing of children to a father who is a nominal member of the Church of England, and a mother who has joined Jehovah's Witnesses. The English Court of Appeal affirmed that the welfare of the children 'must be the first and paramount consideration of the court.' The court's approach was as follows (at pp. 245-246):

> It is not for this court, in society as at present constituted, to pass any judgment on the beliefs of the mother or on the beliefs of the father. It is sufficient for this court that it should recognise that each is entitled to his or her own beliefs and way of life, and that the two opposing ways of life considered in this case are both socially acceptable and certainly consistent with a decent and respectable life …
>
> It seems to me that when one has, as in this case, such as conflict, all that the court can do is to *look at the detail of the whole circumstances of the parents and determine where lies the true interest of the children.* (emphasis added)

[156] Similar sentiments were expressed by the English Court of Appeal in *Re R (A Minor) (Religions Sect)* [1993] 2 FCR 525. The case involved a child whose father was a member of the Exclusive Brethren, but was subsequently withdrawn from the fellowship. According to the tenets of the religious sect, the effect of; such withdrawal means that the father's contact with any member of the Brethren was severely restricted. The child had received care from, and was brought up in the environment of members of the Brethren. The court held as follows:

> It is no part of the court's function to comment upon the tenets, doctrines or rules of any particular section of society provided that these are legally and socially acceptable …
>
> The impact of the tenets, doctrines and rules of a society upon a child's future welfare must be one of the relevant circumstances to be taken into account by the court when applying the provisions of s. 1 of the Children Act 1989. The provisions of that section do not alter in their impact from one case to another and they are to be applied to the tests set out in accordance with the generally accepted standards of society, bearing in mind that *the paramount objective of the exercise is promoting the child's welfare, not only in the immediate, but also in the medium and long-term future during his or her minority.* (emphasis added)

[157] What can be discerned from the above is that, the law has come a long way from the days when one parent's claim could be considered superior to the other. Where the child's religion or religious upbringing is in issue, the paramount consideration for the court is to safeguard the welfare of the child, having regard to all the circumstances of the case. In so doing the court does not pass judgment on the tenets of either parent's belief. Conversion to another religion is a momentous decision affecting the life of a child, imposing on him a new and different set of personal laws. Where a decision of such significance as the conversion of a child is made, it is undoubtedly in the best interests of the child that the consent of both parents must be sought. The contrary approach of allowing the child to be converted on the consent of only one parent would give rise to practical conundrums. The learned JC has described one such milieu (at para. [35]):

A If by 'parent' is meant either parent then we would have a situation where one day the converted parent converts the child to his religion and the next day the other parent realizing this would convert the child back to her religion. The same can then be repeated *ad nauseam*.

[158] Such a scenario would undoubtedly be detrimental to the welfare of
B the child. Since a literal construction of art. 12(4) would give rise to consequences which the legislative could not possibly have intended, the article should not be construed literally (*Sukma Darmawan* at 247). A purposive reading of art. 12(4) that promotes the welfare of the child and is consistent with good sense would require the consent of both parents (if both
C are living) for the conversion of a minor child.

[159] The need for such a reading is more starkly apparent in factual circumstances such as the present case. In *Teh Eng Kim v. Yew Peng Siong* [1977] 1 LNS 138; [1977] 1 MLJ 234, Raja Azlan Shah FJ (as His Royal Highness then was), explained the considerations arising when custody has
D been given to one parent (at p. 240):

> Any solution to the problem presented here in which custody is given jointly to both parents as suggested by the Appellant exhibits an error in the application of principle …
>
> In the present case I do not think such an order would be appropriate.
E The children and the father are living in different jurisdictions. Since the parent who has custody has control, he or she is put in a position to become the dominant influence, fixing the daily lifestyle of the children. An absent and inactive parent, whatever his legal relationship to the children may be, cannot have such influence. He or she cannot do it by remote control.
F
> *In a situation such as the present, when one parent has been given custody, and it is working well, it is a very wrong thing for this Court to make an order which will interfere with the lifestyle of the new family unit.* Of course, one sympathise with the father, but it is one of those things which he must face when the marriage breaks up. (emphasis added)

G **[160]** In the present appeals, custody of the three children was granted to the appellant by the High Court. Having exhausted all avenues to challenge the custody order, the appellant's husband wilfully disobeyed it and refused to hand over the youngest child, Prasana Diksa, to the appellant. He was found guilty of contempt in subsequent committal proceedings, and his appeal was
H struck out. A warrant of committal has been issued in respect of the husband. The Federal Court has held that having submitted to the jurisdiction of the civil court, it is not open for the husband to ignore the custody order issued by the civil court (see *Indira Gandhi Mutho v. Ketua Polis Negara* [2016] 5 CLJ 353 at paras. [31]-[32]).

I **[161]** Since custody of the children has been granted to the appellant, it is the appellant who exercises the dominant influence in their lives. To allow the other spouse to unilaterally convert the children without the consent of

the appellant would amount to a serious interference with the lifestyle of the new family unit which, following *Teh Eng Kim*, would be a "very wrong thing."

The Decision In Subashini

[162] Reliance has been placed on the case of *Subashini (supra),* wherein the Federal Court held that one parent has the right to convert a child. The relevant passages are reproduced below (at paras. [25]-[26]):

> The wife complained that the husband had no right to convert either child of the marriage to Islam without the consent of the wife. She said the choice of religion is a right vested in both parents by virtue of Articles 12(4) and 8 of the Federal Constitution and s. 5 of the Guardianship of Infants Act 1961.
>
> After a careful study of the authorities, I am of the opinion that the complaint is misconceived. Either husband or wife has the right to convert a child of the marriage to Islam. The word 'parent' in art. 12(4) of the Federal Constitution, which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. In *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300, Abdul Hamid Omar LP, in delivering the judgment of the Supreme Court, said at p. 302:
>
> In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the parent or guardian.

Further down, His Lordship continued:

> We would observe that the Appellant (the father) would have been entitled to the declaration he had asked for. However, we decline to make such declarations as the subject is no longer an infant.
>
> *Therefore, art. 12(4) must not be read as entrenching the right to choice of religion in both parents.* That being so, art (8) is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in *Nedunchelian* and as such, the argument that both parents are vested with the equal right to choose is misplaced. Hence the conversion of the elder son to Islam by the husband *albeit* under the Selangor Enactment did not violate the Federal Constitution. (emphasis added)

[163] It is first noted that the above remarks of Nik Hashim FCJ were *obiter*; the question need not be answered to dispose of the appeal, but was found to be of importance such that a decision by the Federal Court would be to the public advantage (see [14]). More pertinent is the reliance on the sole authority of *Teoh Eng Huat v. The Kadhi Of Pasir Mas, Kelantan & Anor* [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277; [1990] 2 MLJ 300. Teoh Eng Huat concerned a child below the age of 18, who was converted to Islam of her

A own accord by the *Kadhi* of Pasir Mas. Her father sought a declaration that he, as the lawful father and guardian, had the right to decide her religion, education and upbringing. The passage quoted in *Subashini* should be read in context (at pp. 280-281 (CLJ); p. 302 (MLJ)):

> Reverting to the issue before this court, the crucial question remains
B whether the subject, an infant at the time of conversion, had legal capacity according to law applicable to her. It is our considered view that the law applicable to her immediately prior to her conversion is the civil law. We do not agree with the learned judge's decision that the subject although below 18 had capacity to choose her own religion. *As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of*
C *the infant shall therefore be exercised by the guardian on her behalf until she becomes major. In short, we hold that a person under 18 does not have that right and in the case of non-Muslims, the parent or guardian normally has the choice of the minor's religion.* We would observe that the Appellant would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant. (emphasis added)
D

[164] In our view, *Teoh Eng Huat* does not stand for the proposition that the word 'parent' in art. 12(4) means a single parent. The issue in that case was whether the right to determine an infant's religion lies with the infant herself or her parent.

E **[165]** There was no issue as to whether the right may be exercised by one parent without the consent of the other, or both parents jointly. We thus consider that the interpretation of art. 12(4) propounded in *Subashini* is unsupported and erroneous.

F **[166]** It is noted that in translating art. 12(4) of the Federal Constitution, it would appear that the real essence of the English version is eluded. It is literally a case of being lost in translation. The reason 'parent' is used in art. 12(4) is to provide for a situation where indeed there is only one parent of the child – eg, a single parent situation. But where both parents exist, then the Eleventh Schedule shall be relied upon.

G *Guardianship Of Infants Act 1961*

[167] The equality of parental right in respect of an infant is expressly embodied in the Guardianship of Infants Act 1961 (GIA). Section 5 of the GIA provides:

H Equality of parental rights

5(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, **a mother shall have the same rights and authority as the law allows to a father, and the**
I **rights and authority of mother and father shall be equal.**

(2) The mother of an infant shall have the like powers of applying to the court in respect of any matter effecting the infant as are possessed by the father. (emphasis added)

Section 11 of the GIA reads:

> Matters to be considered
>
> 11. The court or a judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[168] The question now is whether the application of ss. 5 and 11 of the GIA to the present appeals is precluded by s. 1(3) thereof, because the appellant's husband is a Muslim:

> **Short title and application**
>
> 1(3) Nothing in this Act shall apply in any state to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that …

[169] In this regard, parallels may be drawn between the GIA and the LRA. Section 3(3) of the LRA likewise excludes the application of the Act to non-Muslims, except in relation to divorce petitions where one party to a civil marriage has converted to Islam:

> Application
>
> 3(3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which profess the religion of Islam shall be solemnised or registered under this Act: but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

[170] It is settled law that conversion does not absolve a person from his antecedent legal obligations (*Kamariah Ali & Yang Lain lwn. Kerajaan Negeri Kelantan & Satu Lagi* [2004] 3 CLJ 409; [2005] 1 MLJ 197 at [37]). Hence, notwithstanding the restriction in s. 3(3) of the LRA, the courts have consistently affirmed their jurisdiction over parties to a civil marriage after the conversion of one partner to Islam, in granting reliefs beyond decrees of divorce. In *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708; [1994] 3 MLJ 117, the Supreme Court held that the High Court was entitled to exercise its continuing jurisdiction to grant ancillary relief to a wife in a civil marriage, whose husband converted to Islam after the marriage was dissolved. The Supreme Court found that the application of the LRA was not precluded by s. 3(3) (at p. 712 (CLJ); pp. 123-124 (MLJ)):

> Section 3(3) provides that the Act shall not apply to Muslims or Muslim marriages may be solemnised or registered. This clearly means that the Act only applies to non-Muslims and non-Muslim marriages. In the present reference, it is common ground that both parties were non-Muslims who contracted a non-Muslim marriage. The High Court

A dissolved the said marriage and thereafter the petitioner filed an ancillary application under ss. 76 and 77 of the Act. From the above facts, it is without doubt that the Act applies to them since they were non-Muslims. It follows that as the petitioner's application under ss. 76 and 77 concerned matters affecting both parties' legal obligation as non-Muslims and incidental to the granting of the divorce, the High Court would have
B jurisdiction to hear and determine the ancillary proceedings despite the fact that the Respondent had converted to Islam after the divorce but before this hearing of the ancillary application.

… In the context of the legislative intent of s. 3 and the overall purpose of the Act, the Respondent's legal obligations under a non-Muslim marriage cannot surely be
C *extinguished or avoided by his conversion to Islam.* (emphasis added)

[171] The same principle was applied by the Federal Court in *Subashini (supra).* The court held at (para. [19]):

The husband could not shield himself behind the freedom of religion clause under Art 11(1) of the FC to avoid his antecedent obligations
D under the 1976 Act on the ground that the civil court has no jurisdiction over him. It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore, the status of the husband and wife at the time of registering their marriage was of material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does
E not automatically dissolve upon one of the parties conversion to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect of divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam. (emphasis added)

F **[172]** The above cases were recently endorsed by the Federal Court in *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505; [2016] 1 MLJ 585. In holding that the civil court retained jurisdiction over the custody of the children of the civil marriage despite the ex-husband's conversion to Islam, Raus Sharif PCA (as His Lordship then was) held at
G (paras. [22]-[23]):

We have no reason to depart from the earlier decisions. We are of the same view that a non-Muslim marriage does not automatically dissolve upon one of the parties converting to Islam. The civil courts continue to have jurisdiction in respect of divorce as well as custody of the children
H despite the conversion of one party to Islam.

In the present case, the ex-husband and the ex-wife were Hindus at the time of their marriage. By contracting the civil marriage under the LRA they are bound by its provisions in respect of divorce as well as custody of the children of the marriage. (emphasis added)

I

[173] It is clear that in a situation where one party to a civil marriage has converted to Islam, the ex-spouse (ie, the converting spouse) remains bound by their legal obligation under the LRA and the application thereof is not excluded by virtue of s. 3(3). The same principle can be applied in respect of the operation of the GIA in the present appeals. The children in question are children of the Hindu marriage between the appellant and her husband.

[174] Under the GIA, both parents have equal rights in relation to the custody and upbringing of the infant children and the wishes of both are to be taken into consideration. The conversion of the husband to Islam does not alter the antecedent legal position, nor does it bring the children out of the ambit of the GIA.

[175] Based on a purposive interpretation of art. 12(4) read with the Eleventh Schedule of the Federal Constitution, and on an application of ss. 5 and 11 of the GIA, it is concluded that the consent of both the appellant and her husband are required before a Certificate of Conversion to Islam can be issued in respect of the children. The third question is thus answered in the affirmative.

Conclusion

[176] The present appeals concern the registration of conversion of children in a non-Muslim marriage to Islam under the Perak Enactment.

[177] We hold that the High Court is seised with jurisdiction to exercise its supervisory power to decide on the complaints made by the appellant against the administrative act of the Registrar of Muallafs in issuing the Certificates of Conversion of the appellant's children to Islam.

[178] We find that the Registrar of Muallafs had no jurisdiction to issue the Certificates of Conversion in respect of the conversion of the children to Islam due to non-compliance of ss. 96 and 106(b) of the Perak Enactment. In giving effect to the statutory provisions of the Perak Enactment the court is not required to inquire into principles of Syariah law or to resolve doctrinal legal issues arising out of the matter.

[179] We also find that the Certificates of Conversion were issued without the consent of the appellant thus contravening art. 12(4) of the Federal Constitution and ss. 5 and 11 of the GIA. The Certificates of Conversion are void and must be set aside.

[180] Insofar, as we are concerned, this decision establishes the comprehensive regime of judicial review based on standard concepts of justiciability.

[181] For the avoidance of any doubts, our decision in these appeals is to have prospective effect. The doctrine of prospective overruling will apply here so as not to give retrospective effect to decisions of the courts which had already taken place prior to the date of this judgment.

A **[182]** For the reasons abovestated we allow all the three appeals by the appellant. The majority decision and the orders of the Court of Appeal are hereby set aside. We affirm the decision and orders of the High Court. There will be no order as to costs.

Zulkefli Ahmad Makinuddin PCA (concurring):

B **[183]** I have read the judgment in draft of my learned sister judge Zainun Ali FCJ and wholly agree with the views expressed on the issues raised and the decision arrived at by Her Ladyship.

[184] Her Ladyship has comprehensively and systematically dealt with all C the issues raised under the three questions of law posed before this court. I would like to add to the judgment and state our views as regards the third question of law posed as follows:

> Whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam D can be issued in respect of that child.

[185] The issue of religious conversion of young children into the Islamic faith is a contentious issue and has been the subject of discussion in the public domain in recent times. It has been noted that even the executive and the Legislature have been contemplating introducing an amendment to the E relevant laws to give effect to the position of the rightful party over the issue.

[186] I would like to state here that in deciding the issue before us, as judges, we are not swayed by our own religious convictions and sentiment over the issue.

F **[187]** I am reminded of the proud accolade of the late Tun Suffian, former Lord President of Malaysia in his Braddel Memorial Lecture in 1982, when speaking of the Malaysian Judiciary to a Singapore audience he said:

> In a multi-racial and multi-religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim G or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion – so that nobody reading our judgment with our name deleted could with confidence identify our race or religion, and so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot.

H **[188]** It may be so that looking at the issue purely from the viewpoint of the Syariah law and its precepts, that the decision may lean in favour of the party who argues from that perspective of the law. In the present case, in upholding the rule of law, we have to decide on the issue strictly on the basis of the relevant laws, case authorities and the provisions of both the State and the Federal Constitution governing the particular issue.

I